B E & K Construction Company *and* Local Union 238, International Brotherhood of Electrical Workers, AFL–CIO *and* Local Union 96, United Association of Plumbers and Pipe Fitters, AFL–CIO. Cases 11–CA–14332, 11–CA–14543, 11–CA–14359, and 11–CA–14538

June 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On April 9, 1993, Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, including, in the case of the Respondent, a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the exceptions in light of the record and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt his recommended Order, which is modified to reflect the amended remedy and other modifications as set forth in full below.[3]

The Respondent has excepted to the judge's recommended remedy that it offer immediate employment to the 10 discriminatees. The Respondent notes that, although there are only three actual hiring decisions in dispute—i.e., the hiring of employees Michael Woods, Garland Payne, and Anthony Owen into jobs for which the alleged discriminatees had applied—the remedy requires offers of employment for more than three employees. As explained below, we find merit in the Respondent's exception to the judge's recommended Order insofar as it requires offers of immediate employment to 10 employees and backpay apportioned among all of them. Instead, for the reasons stated, we direct an offer of employment and backpay for employee James Loudermilk and two others whose identity is to be determined in compliance; other remedies, dependent in part on further compliance determinations, are provided for the other seven discriminatees.

With respect to James Loudermilk, the judge found and we agree, that, had the Respondent not been motivated by animus against the Union, Loudermilk would have been hired as a journeyman pipe welder instead of Anthony S. Owens. Accordingly, we shall grant the traditional offer of employment and backpay order as to him. This leaves nine discriminatees for consideration for the remaining two positions. In these circumstances, we will order offers of employment and backpay for those two discriminatees who, as determined in the compliance stage of this proceeding, would have been hired for the remaining two positions. This is consistent with the Respondent's duty to those who would have been hired but for its discrimination. This leaves seven discriminatees who were potential hires but for whom, so far as the current record shows, no job openings existed when they applied. Nevertheless, those employees were discriminatorily denied consideration for employment and are still entitled to a remedy. In devising an appropriate remedy, we are mindful of the Board's power to fashion a remedy that is consistent with Congress' mandate to the Board to ''effectuate the policies'' of the Act.[4] We are also cognizant that our remedy should be one that is ''tailored to the unfair labor practice it is intended to redress.''[5] Our remedy should not only ''make employees whole''[6] but also be one that is balanced and ''neutralizes''[7] the discrimination.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the error in the judge's decision in sec. III,E,(20) where he referred to Garland Payne rather than Michael Woods in finding the Respondent had failed to rebut the inference that it discriminated against Roy Evans. This correction does not affect the results.

[2] Contrary to our dissenting colleague, we adopt the judge's dismissal, for the reasons stated by him, of the 8(a)(3) allegations concerning 17 applicants who the General Counsel contended were denied employment because of their union affiliation. Like the judge, we are unwilling to infer the requisite knowledge of union affiliation solely on the basis of an applicant's participation in a union apprenticeship program many years earlier or his inclusion in his application of some employers whom the applicants identified at the unfair labor practice hearing (but not on their applications) as employers who had in the past worked on at least some projects as union contractors. In this regard, we also rely on the judge's implicit crediting of the testimony of hiring agent Brenda Criddle that she had no way of distinguishing union from nonunion employers on the applications other than a few large employers which she understood to work at least sometimes under union contracts. (We also note that, as to two of the large unionized employers, Bechtel and TVA, the Respondent had in fact hired applicants listing those employers.) As for the listing of union scale wages, as the judge noted, in this case wage rates were not a clear guide. In the case of Gene Trammell, for example, one of the employers which Trammell described at the hearing as a union contractor was paying, according to his application, lower rates than those paid on jobs in the same area of the country during the year by two nonunion employers. In sum, under all the circumstances, we agree that the General Counsel did not establish by a preponderance of the evidence that union considerations played a part in the Respondent's failure to hire these 17 applicants.

[3] We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] See *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 347 (1953).

[5] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984).

[6] *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969).

[7] See *Phelps Dodge*, 313 U.S. 177, 192–193 (1941).

In fashioning our remedy, we are guided by the court of appeals' decision in *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251, 258–259 (4th Cir. 1994), and the Board's decision on remand in that case, *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995). In that case, the court agreed with the Board that the employer had unlawfully discriminated against 65 employee applicants by refusing to consider them for hire. The actual number of job openings was unknown, but it was apparent that the number was fewer than the number of discriminatees. The court held that it went beyond the Board's remedial powers to order backpay and reinstatement for all the discriminatees without regard to whether there were available jobs. Id. at 259. The court also held, however, that it was within the Board's powers to order ''*consideration* of [all the discriminatee applicants] in some preferential manner on later jobs'' and that ''perhaps [the Board] also could order reinstatement with backpay *for those found*, in a compliance proceeding, *to have been denied actual positions*.'' Id. On remand, the Board directed that it be determined in compliance whether the employer would have hired any of the applicants but for its discrimination, and as to those for whom such findings were made, that they be offered immediate employment to those positions and paid backpay. If the positions no longer existed at the time the Board's Order issued, it was to be determined whether they would have been assigned to jobs at other sites after those jobs ended. If so, then backpay for the subsequent jobs and offers of employment in current equivalent positions would be appropriate. 316 NLRB at 1244 fn. 7, 1245.

Consistent with those principles, we direct that Loudermilk and the two other employees who would have received the jobs available when they applied, but for the Respondent's discrimination, be offered employment in those jobs and paid backpay. If those jobs no longer exist, then they should be offered employment in current equivalent jobs unless the Respondent shows that it would not have assigned those employees to other jobs elsewhere after the projects in question ended.[8] With regard to the other seven discriminatees, if the General Counsel shows in compliance that nondiscriminatory consideration would have resulted in their hiring into positions equivalent to those for which they applied that became available subsequent to their applications, whether at the Canton, North Carolina site or other projects of the Respondent, they are to be offered backpay attributable to those jobs. If that showing is made, then, as in the case of the other three discussed above, they are to be offered employment in current equivalent jobs, unless the Respondent shows that its personnel policies and procedures do not provide for retaining employees and reassigning them to jobs at other sites after the termination of a particular project. The foregoing measures are designed to put the employees into the position they would have occupied had the Respondent not undertaken to discriminate against them because of their union affiliations.

[8] *Dean General Contractors*, 285 NLRB 573 (1987).

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom, and take certain affirmative action deemed necessary to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire employee James J. Loudermilk, we shall order that he be offered immediate employment in the position for which he applied and is qualified and that he be made whole for any earnings lost by reason of the discrimination against him, from the date of refusal to the hire date of a bona fide offer of reinstatement.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider the employees named below for hire and denying journeyman electrician positions to two of them,

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we shall order that, when the two discriminatees from the above list are identified in the compliance proceeding as the two who should have been hired for the two journeyman electrician vacancies, they shall be offered immediate employment in those positions and backpay. If it is shown at the compliance stage of this proceeding that the Respondent, but for its discrimination, would have hired any of the remaining seven discriminatees to jobs at other sites, we shall order the Respondent to make those individuals whole for the discrimination found and, if those positions no longer exist, to place them in positions substantially equivalent to those for which they applied at Canton.[9] In all instances, backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[9] Consistent with *Dean General Contractors*, supra, liability for subsequent positions may be defeated if it is shown that the Respondent did not transfer employees from project to project.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, B E & K Construction Company, Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging union activity by refusing to hire or in any other manner discriminating against employees with respect to their hours, wages, or other terms and conditions or tenure of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer James Loudermilk immediate employment to the position for which he applied or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any employees hired to fill the position.

(b) Make James Loudermilk whole for any loss of earnings and benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the compliance Order, offer immediate employment to the two discriminatees from the following list, who are determined in the compliance stage of this proceeding, as the two individuals who should have been hired for the two available positions for which they applied and qualified or, if no longer existent, to substantially equivalent positions.

(d) Make the two discriminatees identified in the compliance stage of this proceeding as the two individuals who should have been hired whole for losses sustained by reason of the discrimination against them as set forth in the amended remedy section of this decision. As for the remaining seven discriminatees, if it is shown at the compliance stage of the proceeding, that the Respondent, but for its discrimination, would have hired any of these discriminatees to jobs that became available subsequent to their applications either at Canton or other sites, the Respondent shall make them whole for the discrimination found in the manner set forth in the amended remedy section of this decision.

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(e) Within 14 days from the date of this Order, notify in writing all the 10 discriminatees who applied for employment at the Respondent's Canton project in 1991 and who were unlawfully denied employment that any future job applications will be considered in a nondiscriminatory manner.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Canton, North Carolina, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 9, 1991.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BROWNING, dissenting in part.

I join my colleagues in adopting the judge's findings that the Respondent violated Section 8(a)(3) by refusing to hire 10 applicants for employment as pipewelders and electricians because of their union affiliations. I also agree with the remedy set forth in the majority's opinion.

Contrary to my colleagues, however, I would reverse the judge's dismissal of 8(a)(3) allegations concerning 17 other applicants who applied for jobs with the Respondent during 1990 and 1991. Specifically, I would reverse the dismissals regarding job applicants William Wilson, Cornelius Adams, Christopher Delk, Robert

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Worley, Clifford Boone, Howard Newman, Terry Cole, Gene Trammell, Malcolm Bentley, Leslie Silvers, Danney Vella, Billy R. Lewis, Perry Ledbetter, Joseph Stellitano, Larry Martin, Randy Cutshall, and Stuart Gwyn. As to each of those applicants, the judge dismissed the 8(a)(3) allegation solely on the grounds that the General Counsel had failed to establish a prima facie case of discrimination because, in the judge's view, the evidence was insufficient to show that the Respondent had knowledge of the applicants' union affiliations. I disagree and would find that the applications filed by these 17 individuals put the Respondent on notice of their union backgrounds and sympathies.

It is clear from the record that the Respondent was opposed to hiring any applicant who set forth indicia of union membership or affiliation on his application or resume. All 17 of the individuals named above listed on their applications a long history of employment by numerous unionized employers. Several of the applicants listed as a recent employer the Tennessee Valley Authority, which the judge found was commonly known in the area to employ only employees represented by a union. In fact, the judge found that the Respondent's hiring agents knew that some of the applicants' prior employers were union contractors.

In addition to the extensive history of work for union contractors, the applications of 6 of the 17 applicants indicated that the applicant had been paid at construction industry union wage rates, and the applications of 5 individuals listed participation in union-sponsored apprenticeship programs. The judge found that the Respondent's agents would have had to have known that the past wage rates listed by some of these applicants were union scale.

Nevertheless, the judge refused to infer either that the Respondent's representatives would recognize that the employers listed on the applications were union contractors, or that an employment history of ''union'' jobs would cause the Respondent to disregard qualified applicants on that basis alone. The judge reasoned that even if the Respondent knew that an applicant's prior employment history was with union employers, those applicants could nonetheless ''be viewed as workers receptive to nonunion employment.'' The judge discounted the factor of participation in a union apprenticeship program for several reasons, including the fact that the applicants' apprenticeship training had occurred a number of years before the date of their applications.

Unlike the judge, I believe that it is reasonable to draw an inference that the Respondent would view an applicant who had a history of employment with unionized employers, or who had participated in a union apprenticeship program, as someone who would represent a threat to the Respondent's avowed desire to keep its work force nonunion. The Respondent is a large national construction firm, with projects and contacts throughout the area involved in this case. At least with respect to the projects at issue here, the Respondent maintained an aggressive, affirmative, antiunion policy. To this end, the Respondent discriminatorily denied employment to the 10 job applicants listed in my colleagues' decision. In light of all these circumstances, it is reasonable to conclude that the Respondent's representatives were well aware that the employers listed on the 17 applicants' applications were unionized contractors, and that the Respondent believed that hiring applicants who had worked for those employers would jeopardize its nonunion status. It is equally reasonable to infer that the Respondent would be similarly hostile toward applicants who had participated in union apprenticeship programs, no matter how long ago that participation occurred.

Thus, I would find that the General Counsel established a prima facie case of a discriminatory refusal to hire concerning each of these 17 job applicants. The record shows that the Respondent failed to carry its *Wright Line*[11] burden to demonstrate that it would have denied employment to these 17 individuals, even absent their union affiliations. Accordingly, I would include the 17 applicants named above in the list of discriminatees who are entitled to the remedy for which we have provided in our Decision and Order.

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage union activity by refusing to hire, or in any other manner discriminate against employees with respect to their hours, wages, or other terms and conditions or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer immediate employment to James Loudermilk, dismissing, if necessary, any employees hired to fill the position, and to the two discriminatees from the list below who are determined in the compliance stage of this proceeding as the two individuals who should have been hired for the two available positions for which they applied and qualified, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed.

WE WILL make them whole for any loss of earnings and other benefits resulting from our discriminatory refusal to hire, less any net interim earnings, plus interest.

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WE WILL make whole any of the remaining seven discriminatees from the above list, in the manner set forth in our decision and amended remedy, if it is shown at the compliance stage of this proceeding, that, but for our discrimination, we would have hired any of them to jobs at other sites.

WE WILL, within 14 days from the date of the Board's Order, notify in writing all the 10 discriminatees who applied for employment at our Canton project in 1991 and who were unlawfully denied employment that any future job applications will be considered in a nondiscriminatory manner.

B E & K CONSTRUCTION COMPANY

Paris Favors, Esq., for the General Counsel.
Dion Y. Kohler, Esq., of Atlanta, Georgia, and *G. Scott Humphrey, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart)*, of Greenville, South Carolina, for the Respondent.
Jerry J. Rogers, Business Manager, of Enka, North Carolina, for the Electricians Union, and *Lewis Todd*, Business Agent, of Asheville, North Carolina, for the Plumbers Union.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. On an original unfair labor practice charge filed on April 9, 1991, in Cases 11–CA–14332 and 11–CA–14553, a consolidated complaint issued on February 25, 1992, alleging that the Respondent independently violated Section 8(a)(1) by advising a job applicant that it would be futile for him to seek employment, and violated Section 8(a)(3) and (1) of the Act by refusing, on various dates, to hire 43 job applicants as electricians because of their union membership.

In Cases 11–CA–14359 and 11–CA–14538, a consolidated complaint issued on October 31, 1991, on an original unfair labor practice charge filed on April 9, 1991, alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing, on various dates, to hire 28 job applicants for pipefitting or pipe welding positions because of their past membership in or affiliation with a labor organization.

In duly filed answers, the Respondent denied that any unfair labor practices were committed.

Pursuant to an order of consolidation dated March 10, 1992, the above-captioned proceeding was heard in Asheville, North Carolina, on various dates in March, April, and May 1992. Following close of the hearing, briefs were filed on behalf of the General Counsel[1] and the Respondent.

On the entire record,[2] including my opportunity directly to observe the witnesses and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, is engaged in general construction at various sites throughout the United States including a jobsite at a lumber mill operated by Champion International in the town of Canton, Heywood County, North Carolina. At that location, the Respondent is engaged in a plant modernization project. In the course thereof, the Respondent during the calendar year prior to issuance of the complaints, received at the jobsite goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Running throughout the General Counsel's posthearing brief one finds rejection of a principle fundamental to analysis of cases of this kind. Thus, a fledgling in this field sooner or later would grasp that a refusal to hire case must be tried on the basis of facts known to the party charged. Counsel for the General Counsel was fully mindful of this limitation before the case was briefed. At the hearing, he was informed *repeatedly* that details not on the applications, or not shown otherwise to have been communicated to the Respondent, could not be considered. The guideline for briefing should have been clear when, in reference to such extrinsic facts, counsel was admonished by me, ''you put a burden on me because in my decision, I've got to constantly point out that this evidence . . . is irrelevant, incompetent and not to be considered by any reviewing authority.'' Tr. 757. Nevertheless, counsel for the General Counsel has submitted a posthearing brief replete with references to otherwise material facts that not only were not communicated to the Respondent, but hardly could have been known by the latter. I find it troubling that more and more, one reads a brief these days only to conclude that the author is more interested in presenting a road-map to reversal than a document that could be relied upon as useful tool in reaching a sustainable result.

[2] Inadvertent errors in the transcript have been noted and corrected.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges, the answer admits, and I find that Local Union 238, International Brotherhood of Electrical Workers, AFL–CIO (the Electricians Union) and Local Union 96, United Association of Plumbers and Pipefitters, AFL–CIO (the Plumbers Union) are labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

This is another in a line of cases in which the General Counsel contends that a ''merit shop'' employer in the construction industry unlawfully denied employment to numerous applicants on the basis of union membership.[3] The allegations relate to the Respondent's hiring practices at a major modernization project at a papermill operated by Champion International in the town of Canton, located in Heywood County, North Carolina.

Among the crafts required on this job were journeymen pipefitters, and pipe welders represented by the Plumbers' Union, as well as electricians possessing skills within the traditional jurisdiction of the Electricians Union. Both unions were alert to the project and, despite constitutional restrictions barring or tending to restrict employment on nonunion jobs or with offending employers, neither objected to efforts by unemployed members to seek work with the Respondent. There is high unemployment among craftsmen in the building trades in the areas surrounding the job situs.

The issues in this case are narrow, but complicated by the fact that the allegations of discrimination are premised on applications filed individually over a span of 8 months, during a period in which they would not be identified with any viable organizational effort.[4] In fact, the Unions disavowed any ulterior, tactical objectives of this nature, excusing their involvement as a pure attempt to further job interests of unemployed members. Thus, the assessment of legitimacy as to the disappointed job seekers requires greater attention to detail than where organization is the avowed objective, and, to that end, union officials were systematic in their approach, participating directly by filing batched applications[5] or by shepherding members in mass to the hiring situs.[6]

Thus, each allegation requires individual evaluation in accord with the guidelines set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Moreover, as there were no interviews, and few instances where the applicant was in communication with representatives of the Respondent, the information conveyed on the face of the application alone, by and large, stands as the exclusive focus.[7] I am aware of no other case where independent inquiry of this nature is required as to so many applications. In the process, I have followed certain common guidelines in assessing key elements of the General Counsel's case-in-chief. They are dictated by peculiarities present on this record and are explained in conjunction with related findings immediately below.

After discussion of generic, yet crucial, issues that pervade both cases, findings and conclusions with respect to each of the alleged discriminatees are discussed below. The analysis will focus on the General Counsel's proof and whether it warrants, or falls short of, an inference of discrimination, together with a discussion of evidence offered by the Respondent to show that, in no event, would these individuals have been hired under nondiscriminatory considerations.

B. *Union Animus*

1. Interference, restraint, and coercion

Union animus is obviously a key element of the General Counsel's initial proof responsibility under *Wright Line*, supra. Here, direct evidence of an intent to discriminate against union members received its first and only test from an allegation that the Respondent violated Section 8(a)(1) of the Act when Bill Redmond, its electrical superintendent, in so many words, declared that union members would not be considered for work on this project. The General Counsel sought to substantiate this allegation through Ernest Turbyfill, an electrician and member of Local 238, who, as an unsuccessful job seeker at the Canton jobsite, is named as a discriminatee in Cases 11–CA–14332 and 11–CA–14543.

Turbyfill testified that on December 12, 1990, he received a telephone call from someone who identified himself as Bill Redmond.[8] According to Turbyfill, he was told by ''Redmond'' that in reviewing applications, he wished to discuss some items in that of Turbyfill. He started with Turbyfill's heart condition, inquiring if that would impede Turbyfill's performance. Turbyfill replied that it would not. From there, Turbyfill related the following:

> [Redmond] mentioned . . . he noticed on the application that I was a member of . . . Electrician's Union, and I told him that's right, I was; that I . . . had been a member in good standing for 17 years. And, then . . . the next thing I believe what he said was . . . well, I don't think . . . there's any use of you reapplying.

Turbyfill went on to testify that Redmond then hung up, but before doing so capped the conversation by stating, ''we've been through this before and here we go again.''

Redmond is not on active payroll status. He is located at his home in Georgia, and due to illness was not available to testify. It made no difference. I did not believe Turbyfill. There is no evidence that any other applicant had any spontaneous inquiry as to any item on their application, nor was there testimony that any remotely similar remark had been made by any representative of the Respondent. In addition, his account raises question as to why, if Turbyfill was disqualified by reason of union membership,[9] Redmond would

[3] The term ''merit shop'' refers to a class of contractors who operate nonunion, and hence are not bound to any collective-bargaining agreement, or to obtain labor through a union hiring hall.

[4] Cf. *Electro-Tec, Inc.*, 310 NLRB 131 (1993).

[5] See, e.g., *Sunland Construction Co.*, 309 NLRB 1224 (1992); and *Ultrasystems Western Constructors*, 310 NLRB 545 (1993); Cf. *J. E. Merit Constructors*, 302 NLRB 301 (1991).

[6] *Town & Country Electric*, 309 NLRB 1250 (1992).

[7] See *Wireways, Inc.*, 309 NLRB 245 (1992).

[8] Turbyfill never met or spoke to Redmond before, and therefore could not identify his voice. His testimony was based entirely on the speaker's representation. Anyone could have made the call.

[9] Turbyfill testified that he did in fact ''refile'' in January.

contact him,[10] and in doing so inquire as to any physical incapacity.[11] Turbyfill's uncorroborated testimony, if probative, was illogical and lacking in truthful ring. I did not believe it. The 8(a)(1) allegation is dismissed.

2. Inferable animus

The failure of proof as to the above allegation negates any direct evidence that the Respondent actively screened out or would otherwise refuse those with union credentials. At the same time, however, I reject the Respondent's contention that direct evidence of animus is an indispensable element of the General Counsel's case.

In this latter regard, the Respondent cannot escape the economic realities of its chosen method of doing business, and it is perfectly reasonable to infer that the Respondent would protect itself when in a position to perceive a threat to its very existence. Thus, the Respondent operates in a labor intense, highly competitive economic environment in which it bids jobs on a nonunion basis against both union and nonunion firms. The impact of unionization in this context was outlined in *J. E. Merit Constructors*, 302 NLRB 301, 304 (1991):

> [T]he Respondent considers itself as among the class of contractors which refer to themselves as ''merit employers.'' This is nothing more than a ''buzz'' reference to nonunion shop. It is a calling antithetical to any form of contractual relationship with traditional building trade unions. Indeed, one might fairly assume that this class of employers, at least in the area of costs, enjoys a labor-oriented, competitive edge in an industry where bidding wars generate revenues, and effective performance turns upon the ability to attract competent workers on a casual, short-term basis. The benefit of operating nonunion in this industry is magnified when one considers that most industrial maintenance work is more labor intense than customarily encountered in other forms of construction activity, with the ratio of labor to material costs proportionately higher.
>
> There can be little debate that any formal organization drive by an affiliated labor union challenges this fundamental economic advantage. It follows that indiscriminate hiring from that source clearly would enhance the peril. In this light, hiring decisions confronting the Respondent . . . may be equated with a choice between suicide and survival.

These observations are no less germane here. The Respondent has taken steps to preserve its status as a nonunion contractor through a ''Foreman's Informational Manual,'' in which the role of foremen in the merit shop strategy is outlined over the signature of T. C. Kennedy.[12] In essence, the Respondent, through this indoctrination, defines the role of foremen as follows:

> On our merit shop projects, the entire work force from laborer to project manager works as a team without third party interference.
>
> . . . .
>
> Our employees need not look to some outsider to solve our problems; rather, an employee has the right to talk to the foreman and the company about any work problem.

Thus, the merit shop policy is contingent upon exclusion of the ''outsider'' and the ''third party.'' Guidance is provided by Kennedy as just how foremen should implement the merit shop policy in the event the ''outsider'' or ''third party'' should appear, as follows:

> [T]he problems caused by unions [are mentioned] to you because you, as management on the project for **BE&K**, should be aware of the company's position and understand why the company has taken this position. Also, the company expects you to implement this policy. . . . As far as the individual employee is concerned, you are **BE&K**.
>
> You may be asking yourself what you can do. First of all, you can sincerely implement the company's merit shop policy and show your own loyalty to **BE&K**. You should constantly keep the lines of communication with employees open and do not hesitate to answer their questions concerning company policies and benefits, as well as questions about unions. Knowing what's going on among the employees is absolutely is absolutely essential to maintain good employee morale. If employees have complaints, they should feel that there is somewhere that they can be aired, and they will not have to walk around the job with their discontentment festering inside them. Last, you can treat employees fairly. Know the workers and show them respect and try to avoid arbitrary acts.
>
> One of the problems in trying to operate a Merit Shop is that we must always be on the lookout for unions attempting to organize a project.
>
> . . . .
>
> If you ever detect union activity on your project, I want you to call me immediately so we can get expert help and advice at the earliest possible moment.[13]

[10] If, as he conceded, Turbyfill's earlier applications contained the same entries under ''Medical History'' as in his January 6 application, it seems unlikely that he would have been singled out for special attention.

[11] In passing, while I did not believe all the testimony of Brenda Criddle, the onsite personnel manager, I believed her testimony that, other to (sic) request specific individuals, the operating supervisors were not involved in the hiring process and did not review applications.

[12] Kennedy at the time was the president of B E & K, Inc. It is my understanding that he no longer occupies this post, but remains as chief executive officer. B E & K is the corporate parent of B E & K Construction Company.

[13] GCX-6, pp. 5–6. The manual also instructs foremen as to adherence to law and against the commission of unfair labor practices, including discriminatory hiring practices. This language does not offset the animus inextricably embedded in the merit shop philosophy, nor allow one to disregard the competitive economic considerations from which it springs. Exculpatory language is more easily drafted than followed, especially should the very heart and soul of the business

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Having studied these resistive guidelines, it is understandable that the Respondent would overreact once overtures were made by the Unions concerning manning of the job. Thus, the Respondent was alerted, beginning in late January 1991,[14] that the Unions were interested in seeking employment for their members. By letter dated January 23, Jerry Rogers, the business agent for the Electricians Union, forwarded 48 applications to Bill Redmond, the electrical superintendent at the Champion jobsite. (GCX-106(a).) By letter dated January 30, the Respondent's project superintendent, Randall Evans, responded to the letter indicating that as the Respondent did not recognize the Electricians Union further communications would not be acknowledged. (GCX-106(b).)[15]

The Plumbers Union followed suit. By letter of February 3, Lewis Todd, the business agent for Local 96, forwarded 12 applications of its members to Electrical Superintendent Redmond.[16] As in the case of Rogers, the Todd letter was answered by Randall Evans.[17]

Here again, the letters expressed neither an interest in bargaining nor organization. Both simply were in quest of jobs for unemployed members. Nevertheless, the Respondent adopted a highly protective stance. Thus, none were answered by Redmond, the addressee, nor by Personnel Manager Criddle. Instead, Evans, the project superintendent, who denied any role in hiring decisions, did so.[18] He did so without reference to the applications that had been submitted.[19] He did, however, specifically address an uncommunicated organizational threat which he attempted to rebuff as follows:

> One of the fundamental cornerstones of BE&K Construction Company is our strong, personal relationship with our employees. BE&K firmly believes that the interests of its employees are best served by open and direct communications between our Company and each employee. We do not believe that any third party is needed to facilitate such communications. Our employees also agree with this philosophy. Our employees have not seen any necessity to be represented by outside interests, and accordingly BE&K is not signature to any collective-bargaining agreement with any labor union.

The union letters appear to have struck a sensitive chord. This ''knee jerk'' response makes it impossible to conclude that B E & K, a firm that twice before ran afoul of the law with respect to employees who evidently did not ''also agree with this philosophy,''[20] would stop at this rebuff and refrain from internal strategies where called on to defend its philosophy.

However, when applied to individual cases, this evidence is not strong enough to support a notion that discrimination is inherent or presumptive in the case of every disappointed applicant whose past reflected union membership, or employment on union jobs, or both. It is my impression that it would be difficult to man a job of any size under such constraints. See, e.g., *J. E. Merit Constructers*, 302 NLRB 301, 308 fn. 51 (1991). Moreover, precedent fails to substantiate *any presumption* that merit shop employers customarily engage in systematic discrimination of this kind, and I reject any general assumption that illicit discrimination exists in every case where an applicant, whose past is known to include union membership or union employment, goes unhired.[21] To so hold would seem particularly prejudicial in a case where, as here, thousands of applicants have been bypassed, and where the focus of the claim of illegality, as defined by the complaint, requires a review of the propriety of the Respondent's preference for one applicant over the other upon naked comparison of competing applications. Under *Wright Line*, the bypass of qualified union members, even in the face of extreme union hostility, alone, would not establish a prima facie case. *Windemuller Electric*, 306 NLRB No. 125 (1992); *J. E. Merit Constructors*, 302 NLRB 301, 303–304 (1991). The principle assumes added significance where the General Counsel has failed to establish direct evidence of an intention to exclude union members.[22] In any event, it

be threatened. As matters stand, the merit shop policy, the direction that foremen honor it, and the improbability that the Respondent could survive if unionized, are factors tending to support the General Counsel's claim as to the probability of discrimination in this case.

[14] Unless otherwise indicated, all dates refer to 1991.

[15] A second round of communication opened on February 18, when Rogers resubmitted 38 applications. Evans replied by letter of February 21. GCX-106(c) and (d). A further letter by Rogers dated February 26 went unanswered. GCX-106(e). There also was no response to his March 28 letter to the Respondent's president, Ted Kennedy. GCX-106(f).

[16] The fact that Redmond was targeted by the Plumbers Union might well have suggested that Todd was getting information from the Electricians Union, and that the labor organizations had embarked on some sort of concerted venture. GCX-2(a). Evans admitted that the submission of pipefitter applications to an electrical superintendent was sufficiently unusual to prompt him to inform the Company's counsel in Birmingham, Fred Garrick.

[17] GCX-2(b). The rejection of these ''batched'' applications did not give rise to any violation, anticipatory or otherwise. This much is conceded by the General Counsel. The latter acknowledges that the Respondent had a nondiscriminatory requirement that all applications be completed and filed personally by the job seeker at its employment office.

[18] Criddle testified that Redmond approached her with the Rogers letter, but she directed him to Evans. Evans testified that when Redmond presented him with Todd's letter, he contacted Fred Garrick, the Respondent's in-house counsel in Birmingham. He denied calling Garrick in furtherance of the policy whereby foreman and supervision are to be on the lookout for unions trying to organize. Contrary to Evans, this is the only logical explanation for his actions appearing on the face of this record.

[19] These applications were returned to the individual applicants, apparently with declaration that such documents had to be completed in person at Respondent's personnel office. Evans, in his correspondence with Todd and Rogers, made no reference in either regard, simply declaring that ''[a]ll applicants for employment are given due consideration under employment guidelines established by BE&K.''

[20] See *B E & K, Inc.*, 252 NLRB 256 (1980); *B E & K, Inc.*, 260 NLRB 574 (1982).

[21] See *Tyger Construction Co.*, 296 NLRB 29, 37 (1989). In so concluding, I am alert to *Ultrasystems Western Constructors*, 310 NLRB 545 fn. 2 (1993), where the Board upheld a judge's 8(a)(3) findings where predicated on applications that merely signified that disappointed applicants had past employment on union jobs. That view, however, was expressed in the context of a ''hiring policy which screens job applicants to uncover suspected union sympathizers.'' On that basis, *Ultrasystems* is distinguishable on material grounds.

[22] Cf. *J & L Enterprises*, 310 NLRB 121 (1993); *Electro-Tec, Inc.*, 310 NLRB 131 (1993). In these cases, the prima facie case was

would subvert the explicit terms of Section 8(a)(3) if employers were impelled to grant a hiring preference to those with union background or face the consequences of a presumptive unfair labor practice. In sum, absent more direct evidence than has been presented here, it would be inappropriate to speculate that the Respondent adopt a practice of broad-brushed discrimination against any and all who could be tied to a labor organization.[23]

On the other hand, the Respondent's need to remain nonunion is the essence of its competitive posture. To that end, it has devised a published strategy for combating unionization. At a minimum, Evans' response to the union letters confirms that organization would not be viewed with indifference or quiet resolve. As indicated, it is a matter of survival, and while it would be unfair to assume that union membership or employment alone would impel the Respondent to violate the law, it would be naive to assume that it would treat with equanimity applicants, who are not just interested in a job, but whose application evinces an overt organizational threat in terms so bold as to be equatable with commitment to undermine the merit shop philosophy. As a traveling merit employer intent on walking the tight rope between the threat of unionization and the need to staff a distant job with skilled personnel, the inference is logical that the hiring process will be tilted dramatically against those whose employment facially is incompatible with the merit shop philosophy.

Criddle would disagree. She denied that the merit shop philosophy was implemented through, or a point of reference, in the hiring process.[24] Thus, in contrast with foremen, who are instructed to further the merit shop policy and report any threats to it, the personnel office, being the nerve center most vulnerable to union penetration, is described as free of guidelines or obligation to implement the merit shop policy. Project Manager Evans was entirely straightforward in confirming the likely assumption that a personnel director, operating under a policy that required supervisors to maintain a vigil against any sign of union activity ''probably'' would scan applications for earmarks of union affiliation. Nevertheless, my disbelief of Criddle's testimony gives rise to suspicion, but does not establish that applications were in fact screened to staff the job with those posing no risk of organization.[25] However, it is among the considerations that make me hesitant to endorse the Respondent's various arguments that its commitment to a nonunion method of doing business was always ignored in personnel actions.[26]

In sum, should an application of an alleged discriminatee flaunt union alliance under conditions incompatible with merit shop employment, it shall be inferred that a prima facie case has been substantiated if a vacancy existed[27] on the date of discrimination set forth in the complaint, yet was filled from another source, despite the applicant's apparent qualification for the job. See *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

C. *The Knowledge Alternative*

Some applications are flawed on the knowledge issue as well. Thus, even if it were assumed that the Respondent would react in discriminatory fashion where applications merely reflected passive union affiliation, the prima facie case would still require evidence that the Respondent had, or, at least should have known of this involvement.

Of the many discriminatees involved in this case, there is no credible testimony that any verbally communicated the fact, or extent of their union membership to any representative of the Respondent. The applications vary in their disclosure of union sentiment. Some conveyed union allegiance unmistakably. Some contained employment data that Criddle admittedly would have understood as suggesting that the applicant had worked one or several union jobs. In still others, the listed wage rates were so high, even taking account of sectional differentials, that one barely familiar with the industry would assume them to be at union scale.

The General Counsel would go beyond these examples, expecting to meet its proof responsibility through testimony from discriminatees as to whether contractors listed on their application were ''union'' or ''nonunion.'' This view assumes, first, that the characterizations by the discriminatees were accurate.[28] More importantly, it rests on the fallacy that knowledge of these witnesses is binding on the Respondent.

Similarly, the General Counsel elicited testimony from the business managers of the Electricians Union and the Plumbers Union, basically, to the effect that all contractors listed on applications involving persons actually hired by the Respondent, who lacked prior B E & K experience were nonunion.[29] There are additional problems with this testimony.

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founded on specific proof that the employer involved refused to hire those that could be identified as union members.

[23] Despite internal constitutional restrictions on a member's right to work nonunion, many applications in this case reflect employment by alleged discriminatees on both union and nonunion jobs, including those of merit shop employers. There is no reason to infer that the Respondent would react to these individuals differently from other nonunion employers.

[24] Criddle testified, with corroboration from Project Superintendent Randall Evans, that she alone made the hiring decisions at the Champion job for hourly employees in all crafts.

[25] Cf. *Ultrasystems Western Constructors*, 310 NLRB 545 at 554 (1993).

[26] These arguments include references to the fact that some of the discriminatees were offered jobs, and some actually hired. As the General Counsel aptly points out this did not occur until after the charges were filed. Merit shop employers, depending on the exigency of the situation will hire from a pool of union applicants, and yet be found to have discriminated as against others. See, e.g., *Town & Country Electric*, 309 NLRB 1250 (Hansen) (1992).

[27] Once the requisite organizational threat has been demonstrated, these additional elements are crucial to the General Counsel's initial proof responsibility. For, no matter how severe the opposition to unionization, the allegations in question require affirmative showing that the dissatisfied applicants suffered actual prejudice in the hiring process. *Tyger Construction Co.*, 296 NLRB 29, 37 (1989).

[28] Most of the employment reflected on the applications is in the southeastern sector of the United States where right-to-work statutes often prevail. Work on ''union'' jobs in these jurisdictions does not necessarily signify union membership. Some contractors in their own name work both union and nonunion depending on the particular jobs. Some contractors, as this record demonstrates, converted at some point from organized to nonunion or, presumably, vice versa. In the case of union jobs, hiring halls are obligated to refer and do refer nonmembers to contract jobs, who are not required, because of ''Right to Work Laws,'' to join during such employment.

[29] The Respondent preferred to hire its former employees. The General Counsel concedes to legitimacy of this preference, and va-

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Neither witness was unbiased. Both were vague in offering a foundation for their testimony. Their lack of objectivity was compounded by the fact that their testimony was often based upon scuttlebutt *or* understandings gleaned from secondary sources, thus, leaving room for differences of opinion, if not error.[30]

For her part, Criddle, who made all hiring decisions, denied that she was aware generally of the identity of union contractors. She admitted to knowledge of union status only in the case of Bechtel, TVA, Kellogg, and Morrison-Knudsen. She denied access to any data base or compilation that listed union contractors operating in the United States. In any event, there is no evidence that such references were available, nor would there be reasonable basis for inference that any of the Respondent's agents were capable of identifying which of thousands of contractors operating in this country who are, or were union, and which were not. In the same vein, it has been deemed unreasonable to draw negative inference as to just which contractors Criddle or other of Respondent's agents would have known to be union in connection with any specific application. It strikes as extremely doubtful that she or Evans would have been able to recognize the union status of hundreds of contractors. Yet, unless it is inferable that all, or virtually all contractors listed and described as union by the General Counsel were known by the Respondent to be union, the applications alone would not, in this respect, convey the requisite evidence of knowledge. These considerations are relevant to analysis, to follow, of the individual cases.

D. *Cases 11–CA–14359 and 11–CA–14538*

1. Preliminary statement

The Plumbers Union maintains an office in Asheville, North Carolina, some 22 miles distant from the Champion mill. The General Counsel has presented a number of applications ostensibly completed and filed personally at the jobsite by members, present and past, of Local 96 or sister locals of the Plumbers Union, or those who profess to be members of other labor organizations. These applications ostensibly were generated at various times between November 1990 and August 1991. The complaint, as amended, and subject to rulings made at the hearing,[31] presently includes viable allegations that 19 applicants were denied employment as pipe welders or pipefitters for proscribed reasons. None were interviewed and only rarely was their direct communication between the Respondent and the applicant. Thus, almost in every case, the claim of discrimination turns upon what the Respondent might have gleaned from within the four corners of the application.

The evidence as to vacancies during the relevant timeframe are substantiated by documentation as pipe welders and pipefitters actually hired by the Respondent during the relevant timeframe. This data appears in General Counsel's Exhibit 5.[32] The General Counsel contends that applications filed by some of these individuals demonstrates that they were less qualified than the alleged discriminatees. (GCX-4(a)–(aa).)[33]

2. The individual cases

(1) *William Hartley Wilson*. Wilson allegedly was denied employment unlawfully on November 5, 1990. His application was dated October 22, 1990. (GCX-3(c).) It sought work as pipefitter, while reflecting past employment in that capacity. It shows that he left school some 43 years earlier, having completed the ninth grade.[34] It lists employment with four contractors, two of whom he described as union,[35] and the others nonunion. In this respect, the application reflects past employment with three contractors, all described by Wilson as union.

On the face of his application, there is no reasonable basis for inferring that agents of the Respondent knew or should

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cancies filled on this ground will not support an allegation of discrimination.

[30] Todd, of the Plumbers Union, struck as the most candid of the two. His testimony, confessedly, was geared to a broad definition of nonunion status. Thus, he declared that he would consider all contractors to be nonunion unless among the ''several thousand'' signatory to the International collective-bargaining agreement. It is not likely that the Respondent would have similar expertise. Todd also testified that he did not ''study'' the applications and did no research on the status of the named contractors but ''went totally by memory.'' This despite the fact that he never before heard of ''a few'' of the listed firms.

[31] The General Counsel takes issue with my rejection of applications bearing the names of alleged discriminatees who did not appear at the hearing. Apart from the due-process issues that would be raised, and were amply reviewed at the hearing, these documents were not authenticated, and there is no evidence whatever that they were completed or filed by the person whose name they bear. Accordingly, there is no evidence that Paul Lambert, Jimmy D. Barton, Michael Glenn Dale, and Harold Denny Snodgrass applied for employment, and hence, contrary to the General Counsel, they are not similarly situated to alleged discriminatees that provided testimony establishing that applications were duly filed in accord with nondiscriminatory requirements. Cf. *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676 fn. 1 (1990). Moreover, no excuse is offered for the nonappearance of these alleged discriminatees. They were subpoenaed, and presumably mileage fees were tendered. One can only assume that their lack of cooperation, to the prejudice of this proceeding, was solely attributable to the fact that they had better things to do with their time. Accordingly, the allegations as to Lambert, Barton, Dale, and Snodgrass are dismissed. At behest of the General Counsel, the complaint was amended to delete Edward Gardineer, Jerry Franklin, Kenneth W. Stafford, William R. Stafford, Michael E. Miller, and Jesse S. Willis.

[32] The Respondent's arrangement with the Heywood Count Community College to provide educational services has only limited relevance to the inquiry. There is no evidence that anyone hired to a journeyman post enrolled in any of these courses to develop or improve the skills of his particular craft. This opportunity was offered to laborers and helpers who wished to upgrade, renew, or learn additional skills. There is evidence that three graduates of the welder training program were hired as student pipewelders at the rate of $10.40, rather than the journeyman rate of $10.75.

[33] In evaluating the evidence bearing on the prima facie case, this factor has been discounted. In my opinion, it is inappropriate in assessing the General Counsel's initial proof responsibility to substitute for the Respondent's hiring judgment on the basis of the vagaries contained in employment applications. Any comparison of experience claims in such a document would naturally rest on the fallacy that this data alone will always or will even normally furnish the only legitimate basis for an employer's hiring choice.

[34] Wilson testified that he had been a member of Local 96 for 20 years.

[35] Wilson was familiar only with the projects he worked on, and was unaware whether these contractors worked union on other jobs.

have known that Wilson was a union member, or that he previously had been employed on union jobs. As I read the application it does not list employment in the industry beyond 1987. Wilson's listed wage rates, the highest being $11.70 per hour, would not necessarily suggest that he at any time labored at union scale.[36]

His application does name Todd as a reference. However, there is no basis for concluding that anyone reading it on behalf of the Respondent would have known Todd, or his association with the Union, nor could this be ascertained on the face of the application. It simply entitles him as a ''manager,'' without specifically identifying him with Local 96 or the Plumbers Union. Indeed, it does not give the Local 96 address, but merely provided Todd's home address. At this early date there is no foundation for assumption that the Respondent would associate this name with any labor organization.[37]

Accordingly, the evidence is deemed insufficient to support an inference that union considerations played even a partial role in Wilson's failure to land a job. The 8(a)(3) allegation in his case is dismissed.

(2) *Jack T. Harris*. It is alleged that Harris was unlawfully denied hire on February 27, 1991. His application is dated February 19. (GCX-3(a).) Harris was not a member of Local 96 or any labor organization at the time. He at one time had been a member of Local 612, Plumbers Union, based in Dekalb, Illinois. Prior to that date he had been unemployed for more than a year. There is nothing in his application that communicated union membership, currently or in recent years, or that Harris would pose an organizational threat. The fact that he was trained some 30 years ago in a plumbing and pipefitting school offers not a clue to union affiliation or membership.[38]

There is no reason to assume that anyone processing this application would be in a position to identify contractors listed on his application and resume as union. If they could, they would have learned that Harris had not worked a union job since 1983. This would hardly support an inference that anyone examining that document on behalf of the Respondent would have rejected it on belief that Harris presented a risk to the merit shop philosophy. The General Counsel has failed to establish that Harris was refused employment on this job because of a past or present union membership, or out of a fear that B E & K's nonunion status would be threatened by his retention.[39] The 8(a)(3) allegation in this case shall be dismissed.

(3) *Christopher Delk*. It is alleged that Delk was unlawfully denied hire on February 4. He applied for work at B E & K as a pipefitter on January 8.[40] His residence was in Aiken, South Carolina, some 250 to 300 miles distant from the jobsite. His application is virtually without points of contact in western North Carolina. No employment is listed outside of South Carolina. In fact, he apparently last worked in October 1989.

Delk listed three contractors on his application. He described only one, M. K. Ferguson, as union. He last worked for the latter in December 1988. Although the application does not identify the job, it was the Savannah River site, a government project that presumably was subject to Federal prevailing wage and benefit laws. Delk did not know whether M. K. Ferguson operated nonunion on other jobs. The hourly rate was no different on this job than he received as a ''fitter'' in his nonunion employment with Southern Industrial Piping.

While this, of course could not be discerned from the application, it is of interest that Delk was never a member of Local 96, or any affiliate of the Plumbers Union. He claims membership in a local of the Sheet Metal Workers Union, but admits that he ceased paying dues about 5 years ago.

Against this background, it is concluded that the General Counsel, from the data appearing on the face of the application, has failed to establish a prima facie case of discrimination. The fact that on one occasion, Delk was employed by on a government job that was union, for a contractor that he could not identify as having worked solely under union contract, would not alone carry a reasonable suggestion that he might have been denied employment, to any degree, in consequence of a union background. The allegation that Delk was denied employment in violation of Section 8(a)(3) and (1) of the Act is dismissed.[41]

(4) *Cornelius Adams*. Adams sought work as a pipefitter on November 27, 1990, and again on April 26, 1991. (GCX-3(d) & (e).) Adams avers that he filed an additional application in September 1990. He was mistaken. The dates given in his affidavits, his testimony, and the documentation are not consistent, and Adams obviously was confused and burdened by a lapse in recollection. It is concluded that he applied only on those dates which are confirmed by documentation on this record. His November application signifies that he had worked 25 years as a pipefitter. He describes four of the five jobs listed on that application as union jobs. On his subsequent application, he listed the nonunion job on top, followed by a second that he described as nonunion.

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[36] Criddle testified that it was her impression from this application that Wilson's experience was in commercial plumbing, rather than industrial pipefitting.

[37] This would not be true as of February 3, 1991, when Todd wrote Redmond in an appeal that certain applications be considered. I reject Criddle's testimony insofar as she would have me believe that she neither read nor was briefed in detail as to the content of either this document or those sent by Rogers on behalf of the electricians.

[38] Harris' testimony that this school was sponsored by a Local of the Plumbers Union is not indicated on the application and would not have been discovered solely from examination of that document.

[39] The General Counsel's position was not enforced by the hiring of L. F. Neal on February 27. (GCX-4(b).) Criddle explained that, unlike Harris, Neal sought work as a welder/pipefitter. He was hired as a welder, but later that day failed the welder test. Because he was traveling with another employee that Respondent needed, Neal was not released but assigned to work as a pipefitter. I see no reason to fault the Respondent's judgment in this regard.

[40] Delk testified that at the time he applied, about 200 applicants were lined up for 2 city blocks, standing in the cold.

[41] Even had I found that a prima facie case, it would be concluded that E. S. King, who was hired on February 4, was selected on the basis of a request by a supervisor who had worked with him on a Flour Daniel project. Thus, according to Criddle's credited, Rob Parton, a B E & K supervisor, had worked with King on that job and wanted him on the Canton project. He was contacted by Criddle and hired. King's application listed Parton as his supervisor on the Fluor Daniel job. GCX-4(a). This would suffice to establish that Delk would not have been hired even in the absence of any personal union history.

As for the union jobs, Adams, on cross-examination conceded that he was unaware of whether the firms involved worked union at other locations. Here again, apart from the alleged discriminatee's understanding, there is no evidence that Criddle from the information appearing on Adams' applications would have deduced that Adams presented an organizational threat or that he was affiliated with Local 96 or any other labor organization. Thus, there is no reasonable basis for inferring that union considerations played any part in his case,[42] and, accordingly, the 8(a)(3) allegation in this respect is dismissed.

(5) *Daniel Inglima*. In this case the application apparently was signed and filed on November 15, 1990. Work as a ''pipefitter'' was sought, but at a pay level of only $10 per hour. According to Inglima, of the four contractors listed in his employment history, three were union.

The application reflects that Inglima's training and experience as a fitter was restricted to sprinkler designs as part of overall fire protection systems.[43] Detracting from his desirability is an employment gap showing that he did not work between 1981 to 1986.

According to his testimony, he had not been a union member since 1989. He was unacquainted with Local 96, and he does not claim to have ever belonged to a local of the Plumbers Union that represented construction fitters.

Here again, on the face of the application, there is no basis for assuming that Inglima's characterization of prior employment as union was accurate, nor would it be fair to infer that the Respondent's representatives would have recognized it as such. In sum, the evidence provides no reasonable basis for inferring that Inglima's failure to obtain employment was to any extent based on union considerations, and, accordingly, the 8(a)(3) allegation in his case is dismissed.

(6) *Burrell Joe Clark*. Clark applied twice before May 22, 1991, when he was hired by B E & K. (GCX-5.) His first application was dated January 10, 1991, the second, March 14, 1991. (GCX-3(g) & (h).) Clark was hired on the basis of his March 14 application, though at the time the document had been pending for more than 60 days. This application specified 29 years' experience as a pipefitter. Of the four projects listed by Clark, four were described as union, including two stints each with the Tennessee Valley Authority and Cox Mechanical.

In his posthearing brief, the General Counsel contends that Clark was discriminated against because on January 21, B E & K hired Stephen E. Warren as a pipefitter, who had only ''4'' years' experience in the craft. (GCX-4(l).) Contrary to the General Counsel, Warren's application reflects 6 years' experience as a pipefitter. The General Counsel asserts that under normal circumstances, Clark would have been preferred because of his 29 years' experience as a pipefitter. No other theory of a violation in Clark's case is advanced.[44] In this instance, although Clark listed nothing on his application signifying that he was a union member, were I to assume that the Respondent were of a notion that he was, I nevertheless would conclude that he would not have been hired over Warren. At the time, the Respondent's representatives would have been unaware that Clark had more experience as pipefitter than Warren. For Clark's January 10 application merely listed employment in the craft from February 1989 to October 1990. His actual experience was not conveyed until his filing of March 14, 1991.

In light of Warren's ostensibly greater experience, together with the fact that Clark's January 10 application reflects that he voluntary quit three of five listed jobs, for personal reasons, it is concluded that Warren would have been hired even were Clark not suspected of union allegiance. Accordingly, the 8(a)(3) based on that application shall be dismissed.

(7) *John David Cabe*. Cabe's only application is dated April 2, 1991. He sought a position as a pipe welder. His application reflects that he possesses the special skills of a pipefitter and welder, and lists almost 11 years of almost continuous employment as a welder. His residence, as listed was only 12 miles from the jobsite.

The application clearly conveys Cabe's allegiance to Local 96, Plumbers Union. At the top of his employment record, he lists ''Local Union No. 96,'' its Charlotte office and identifies ''Lewis Todd'' as supervisor.[45]

The General Counsel claims that its case of discrimination is made out by the hiring of Donnie Caldwell as a pipe welder on April 30, 1991. However, on its face, the latter's application lists 17 years of experience as a pipe welder. (GCX-4(s).) Moreover, Caldwell's application reflects a 1991 layoff by Anchor Steam. The latter had been engaged in a project at the Canton Mill and, according to Criddle, Champion requested B E & K to consider Anchor Steam laid-off personnel. Criddle credibly testified that Caldwell was hired on this basis. Accordingly, it is concluded that Caldwell would have been preferred over Cabe even if the latter had no union involvement. The 8(a)(3) allegation in his case is dismissed.

(8) *Larry Dean Bishop*. Bishop applied for work as a pipefitter on February 14, 1991. (GCX-3(j).) His application lists about 4 years' experience as either a pipefitting or pipe foreman. On the face of the application, one would not necessarily assume union affiliation. However, the General Counsel claims, but the Respondent denies, that he attached

[42] Cornelius Adams was one of three members of the Adams family that sought work on this job. the Respondent was presented evidence that it either hired or attempted to hire all three. In the case of Cornelius Adams, Criddle testified that she specifically recalled that a clerk, on several occasions teased her about hiring ''the Adams Family,'' and periodically would mention her unsuccessful efforts to reach members of the group.

[43] Criddle credibly testified that there is a significant difference between the work of a sprinkler fitter and a construction pipefitter, in terms of the size of the pipe, the connective process, and the pipe configuration in the overall system. I am persuaded that greater all around skills and versatility are required of journeyman performing heavy construction.

[44] In a case of this magnitude, it is necessary to bind the General Counsel with his own professed theory of when and why discrimination took place. One must assume that the General Counsel's stated position has been forged with understanding of the underlying facts and prosecuted with the intention of educating the judge. In this light, I have no intention to substitute my own independent analysis of each application filed by each of like craft who had been hired by the Respondent within 60 days of an application filed by an alleged discriminatee, and, based thereon, independently to fashion an alternative theory for a violation. The enormity of this burden would place the administrative law judge in a prosecutory role. In the context, the allegations of discrimination will stand or fall on the General Counsel's professed position.

[45] By then, Todd had been identified to management as a business manager for Local 96. See GCX-2.

a resume to the application. This latter document does convey that in 1967 he successfully completed a 5-year apprenticeship under auspices of ''Local Union # 687.''

First, for reasons previously given, I would not infer discrimination merely on the Respondent's knowledge that the applicant had acquired training through a union apprenticeship. The result would not be altered simply because the application also asserts past employment on union jobs, even if the Respondent was aware of that fact. In any event, here again, the Respondent has effectively rebutted any inference of discrimination.

Thus, to support the claim that Bishop was bypassed for discriminatory reasons, the General Counsel points to the hiring of Jack Hughes on February 25, 1991,[46] and Levi Neal on February 27, 1991.[47] Hughes' application shows that he had been employed by Imoco, a contractor at the Champion mill, as a welder and foreman for 22 years at that site. (GCX-4(y).) Criddle hired Hughes, on recommendation of the pipe superintendent because of his reputed familiarity with the pipe system in the mill and his long employment at that location. On Criddle's credible testimony, it is concluded that Hughes would have been hired over Bishop, even if Bishop had never been associated with a labor organization. The 8(a)(3) allegation in his case is dismissed.

(9) *Michael Rocky Guthrie*. This allegation is founded on an application dated January 24, 1991. It seeks work as a ''pipefitter welder.'' (GCX-3(k).) There is no mention of union affiliation. Guthrie claims that all contractors listed thereon are union. Since the summer of 1989, he earned in excess of $16 hourly on three separate jobs. While applying, he was singled out for a conference with Criddle, who informed as to a shortage of qualified welders, that Guthrie should stay in touch, and that he would probably be called in to take a welding test in the following week. This did not materialize, and, according to Guthrie, when he attempted to follow up he could not get through to Criddle, being told she was busy.

The complaint alleges that Guthrie was discriminated against on January 4 or 24, 1991. By way of brief, it is asserted that this was substantiated by the Respondent's hiring of Samuel McMurray on this latter date, a pipe welder with less experience. (GCX-5.) The Respondent asserts that McMurray was hired together with Tweed Zanone on that date,[48] and that both were preferred because of their training under the Fluor Daniel welding training program,[49] and testimony by Criddle that she received a recommendation on behalf of both from Billy Cole of that firm. Criddle claims that because of her positive experience with graduates from the Fluor Daniel school, she hired both McMurray and Zanone. This preference is not challenged as discriminatory and its implementation substantiates that they would have been hired over Guthrie even were he a suspected threat to the B E & K open shop policy. The 8(a)(3) allegation as to Guthrie is dismissed.[50]

(10) *Clinton Brady Farmer*. Farmer applied for a position as a pipe welder on February 21, 1991. His application does not mention union affiliation. (GCX-3(m).) Of the five contractors listed, he described four as nonunion. By his own admission, he last worked a union job in September 1985. There is nothing on this application to give the Respondent any reason to expect that Farmer presented a threat to its merit shop policy, and, considering the many reasons that could exist for not acting on this application, I find that the General Counsel has failed to establish that union affiliation, to any extent, was among them.[51] The 8(a)(3) allegation in Farmer's case is dismissed.

(11) *Stephen Douglas Adams*. Three applications were identified as having been submitted by Adams before he was hired in August 1991. The first was dated March 12,[52] and the second, June 20. (GCX-3(n) & (o).) A third application dated on July 30 was identified as General Counsel's Exhibit 3(p), but never offered in evidence. The first two applications listed only one nonunion contractor, which was tail-ended with an unspecified employment term. The four remaining contractors were identified by Adams as union. That dated July 30 appears to have adverted to basically the same array of ''union'' contractors listed on the March and April appli-

[46] GCX-5 erroneously describes Hughes as having had prior experience with B E & K.

[47] The hiring of Neal was not relevant to the allegation in the complaint. That document specifies February 25, as the date of discrimination. Having done so, without taking advantage of lengthy opportunities to amend, the General Counsel has established the focus for the defense, and is estopped from altering the theory belatedly without providing the Respondent notice and an opportunity to litigate. Thus, the Respondent cannot be faulted by limiting its defense to the February 25 hiring of Hughes. Imposition of any further burden would be prejudicial. The Respondent was under no more obligation to defend the hiring of Neal than to defend its hiring of Kenny Barnard, Darrell Henderson, or Earl King, all of whom were hired as pipefitters within 60 days of February 14, the date of Bishop's application.

[48] The Respondent asserts that Zanone's hiring is listed on GCX-5. That, however, does not appear to have been the case.

[49] GCX-4(m), RX-4(e). It is not without significance that one of the alleged discriminatees, Stephen Adams, identified Fluor Daniel Construction Company as union, with Daniels Construction Company being its nonunion arm.

[50] No weight is given to the fact that Guthrie was hired by the Respondent on August 20, 1991, following a second application dated July 25, 1991. GCX-3(l).

[51] The General Counsel acknowledges the weakness in Farmer's case, but asserts that the violation should be found because of the inexperience of W. A. Lokerson II, who was apparently hired on February 21, 1991. Lokerson attended the welding course given by Chuck Massie at the Heywood Community College. He listed Massie and Criddle's husband among his references. According to Criddle, he was hired as a student welder at the student's rate of $10.40 after successful testing and attendance at the welding course. There is no reason to assume that he was hired for a journeyman position, nor is there anything suspect in Criddle's explanation for his hire. In passing, it is noted that the Respondent's posthearing brief asserts that Lokerson, as well as Chris Mathews and William D. Payne, were listed on RX-5 as hired on February 21. Although the General Counsel makes no reference to these hirings, Criddle testified that, like Lokerson, Mathews was hired as a student welder based on his performance in Massie's class at Heywood Community College. No testimony was offered as to why Payne was hired, but his application reflects that he possessed skills and experience that would qualify him to a point establishing that his hiring made good sense, and certainly was not so foolhardy as to fill the void in the General Counsel's prima facie case.

[52] Adams was informed of employment opportunities at B E & K by a local unemployment office. When he went to apply there was a ''large crowd'' with a similar intent.

cations. On that document Daniel Construction was replaced by Fluor Daniel Construction, a firm that Adams described as ''union.''

Adams admittedly was hired by B E & K as a pipefitter on August 21. (GCX-5.) He was laid off after the shutdown[53] but recalled in February 1992, where he remained on active payroll status at the time of the hearing.

The complaint alleges that Adams was discriminatorally denied hire on March 18. By way of posthearing brief, the General Counsel argues that this is confirmed by the Respondent's hiring of Darrell Henderson on March 12, whose application shows less qualifications than demonstrated on those filed by Adams. The General Counsel seems to suggest that Henderson's frequent employment with Fluor Daniel, whom Adams described as union, contributes to the claim of discriminatory selection.

There is no evidence that the union status of the listed contractors was so notorious as to make it common knowledge within the industry. Nor would the reported wage rates alone warrant an inference that those who made hiring decisions on behalf of the Respondent were aware or suspected that the employment depicted by Adams was Union. In any event, even if the General Counsel were given benefit of the doubt in this regard, these factors alone would not provide the requisite proof to shift the burden of proof. Moreover, the Respondent has credibly established that Henderson had been recommended for hire by a B E & K general foreman. Criddle testified that this was a recognized basis for preference that was implemented in Henderson's case. The General Counsel makes no claim that supervisory recommendation was an inherently discriminatory or otherwise illegitimate ground for deciding between applicants.[54] The Respondent did not violate Section 8(a)(3) and (1) by denying Adams employment when Henderson was hired.

(12) *James J. Loudermilk Jr*. The July 23, 1991 application in this instance sought work as a pipe welder. Loudermilk's present and past affiliation with the Charging Party is unmistakably conveyed. His employment history specifies that from August 1961 to the present, he worked under ''United Association Pipefitters and Plumbers,'' headquartered in Asheville, N.C. as a pipe welder at ''scale.'' In addition, Lewis Todd is listed as a reference.[55]

Loudermilk admits that on August 23, he was offered employment at B E & K, but turned down the job because he had accepted employment elsewhere. The General Counsel, nevertheless argues that the case of discrimination was perfected when on July 24, the Respondent hired Anthony S. Owens, whose application shows less experience than Loudermilk.[56]

The Respondent apparently relied on General Counsel's Exhibit 5, in this regard which describes Owens as being a former employee of B E & K. In his application, however, Owens checked the box which indicated that he had not worked for B E & K in the past. The assertion by the Respondent that this ''apparently'' was an erroneous response is unsubstantiated by any proof. The discrepancy goes to the heart of the allegation. Prior employment is a legitimate preference which would take precedence over other factors, and I would have no interest in substituting judgment for the Respondent where an applicant was hired on that ground. Here, the record is ambiguous, and does not permit a finding that Loudermilk would not have been hired even if he had not conveyed his union sentiment. This was the Respondent's burden, as in this instance, Loudermilk had brazenly portrayed his affiliation with Local 96 while knowingly seeking work with a merit shop operation. The revelations in this respect would plainly convey an unyielding dedication to views antithetical to the Respondent's method of doing business, and warrants the inference that it was at least a part of the reason for failure to hire him in the vacancy filled the day after he applied. The Respondent thereby violated Section 8(a)(3) and (1) of the Act.[57]

(13) *Norman E. Todd*. The complaint alleges that Todd was discriminated against on May 22, 1991. The relevant application was filed on April 9. (GCX-3(r).) A second application was filed on July 23. (GCX-3(s).) Todd sought work as a pipefitter. His application specified that his skills included ''35 years, mechanic & pipe.'' It also lists employment on jobs that he describes as ''union,'' and which carried substantially higher rates than that paid by the Respondent. Union proclivity was not otherwise disclosed.

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[53] All work on a rehabilitation, or heavy maintenance project cannot be performed while the plant is operational. During the project, those production is customarily suspended to facilitate construction for defined periods. A contractor will swell its payroll and offer extensive overtime to support its commitment to complete the work within the defined shutdown period.

[54] This same defense was offered and substantiated in connection with Kenny R. Barnard, who also was hired on March 18 to a pipefitter position. GCX-5. Barnard was not mentioned in the General Counsel's posthearing brief.

[55] As indicated Todd would have assumed some notoriety with the Respondent's officials in light of Job Superintendent Evans' correspondence with him earlier in the year. See GCX-2(b). I was unpersuaded by Criddle's testimony that she was alerted to the correspondence by Electrical Supervisor Redmond, but did not read and was not briefed as to the content.

[56] According to Loudermilk, the Respondent's personnel office advised him on July 23 that an application that he claims to have submitted a month earlier was not on file. Lost applications were isolated insofar as this record discloses, and in light of the overwhelming number processed, no pattern exists that suggests anything sinister in this instance.

[57] If Owens had been employed previously by the Respondent, documentation should exist to that effect. In fairness, the Respondent should be provided an opportunity to litigate such incontrovertible evidence during compliance stages, or even sooner. This was no ordinary trial. The enormity of the details to be considered under the many allegations each of which had to be addressed individually and in a highly detailed fashion affords convincing explanation as to the confusion that might have led the General Counsel to stipulate to GCX-5 and its representation that Owens had previously worked for B E & K, while, in a like state of confusion, the Respondent was agreeing to the application that indicated that this was not the case. Having witnessed the trial first hand, I cannot imagine that the attorneys would have had an opportunity to conform, compare, and furnish an answer to each segment of each document offered in evidence against them without unduly delaying the process. In my opinion, the burden on the defense by the shear weight of the issues presented constituted an ''extraordinary'' circumstance within the meaning of Sec. 102.48(d)(1) of the Board's Rules and Regulations. While it was the Respondent's burden under *Wright Line* to present its defense unambiguously, if truth is to be served, it would seem only fitting that the former, on request and an appropriate showing, be given an opportunity to clarify the conflict if that can be done on undeniable documentation.

Interestingly enough, this allegation stands on the strength of the General Counsel's contention that the Respondent discriminated by hiring Burrell Joe Clark on May 22, rather than Todd. As indicated Clark is a named discriminatee in this complaint. The General Counsel's argument that Clark was hired to ''cover the Respondent's unlawful pattern of discrimination'' derives its essence from the fact his hiring occurred while the charges in this matter were pending. (GCX-1(bb).) However, this sequence, obviously, imposed no obligation on the Respondent either to hire both to fill the single vacancy that arose on May 22, or to prefer Todd. It is entirely possible that Clark was hired because of his 29 years' experience as a pipefitter, while Todd was bypassed because of Criddle's professed reluctance to fill a journeyman position with one, who as was true of Todd, had worked in the past predominantly as a foreman. Whatever the reason, the General Counsel has failed to show that on May 22 Todd was bypassed in favor of an applicant with lesser union credentials, be they known or unknown. The General Counsel's position is inconsistent, specious, and unfounded as a matter of law. Accordingly, it is concluded that the General Counsel has not established that the denial of employment to Todd on May 22 was, to any extent, motivated by union considerations. The 8(a)(3) allegation in his case is dismissed.

(14) *Bobby Fred Dills*. The complaint alleges that Dills was unlawfully denied employment on July 15. He had applied on May 30 for work as a ''top pipe helper.'' (GCX-3(t).) Although the Respondent would not have known that this was the case, one might deduce from his application that, as he testified, he was not a member of Local 96, nor any affiliate of the Plumbers Union. In fact, he never was.

It is difficult to understand why this allegation has been pursued. From Dills' application it is impossible to ascertain when he last held a job. The document suggests that he had not worked as a fitter since 1983, and that for a firm that the Respondent would not identify as organized, for it was described by Dill in his testimony as ''nonunion.'' Moreover, the majority of the positions listed indicate that he worked as a ''miner.''

In his testimony, he identified three of his past employers as union. Two were coal operators which the Respondent could hardly have been in a position to recognize, and the third was TVA. Although Personnel Manager Criddle admitted to an awareness that the latter was union, on his application, Dills did not indicate that he performed in any construction craft during that employment. Instead, the application listed his position as ''miner.''

The claim on behalf of Dills is baseless for two reasons. His application on its face is incomplete to the point of making him a dubious candidate for employment in a construction job, even as a helper. Second, and most important, no one reading this application would assume that Dills ever was a member of a building trades union. In this case the evidence of union animus would support a likelihood that the Respondent might take steps to protect the merit shop philosophy against organizational threats. But there is neither evidence, nor any rational basis for assumption that this animus would extend to unions generally, or as against one whose application does not disclose that he ever worked for a union contractor in the construction industry. The evidence does not even raise a suspicion that union considerations were a factor in the processing of this application and the 8(a)(3) allegation in this respect is dismissed.

(15) *Douglas Neil Adams*. His application was filed on April 9, apparently seeking work as a pipe welder.[58] (GCX-3(u).) The application states that in 1978 he completed pipefitter/welding training with the ''U.A.''[59] Of the five employers listed, Adams described four as union. His application recites that he was currently employed, and for the last 2 years had been employed with Cox Mechanical as a foreman.

The Respondent contends that on May 18, a Saturday, an attempt was made to contact Adams, but he was not home and there was no response to the message. Criddle testified that she affixed a notation to his application memorializing this attempt. Adams claims that he never received a message. The possible conflict need not be resolved. The complaint sets forth June 12 as the date that Adams was wrongfully denied employment. The Respondent was not obligated, in response to that allegation to justify hirings of pipe welders in advance of that date.[60] Moreover, as of June 12, the only application pending on behalf of Adams was inactive, since it had been filed on April 9.

As the record fails to show the existence of an application that would support the allegation in the complaint, the allegation is dismissed.

(16) *Robert Lewis Worley*. Two applications were filed by Worley, the first on January 10, seeking a job as pipefitter, and the second, on June 4, seeking work as pipefitter welder. (GCX-3(v) & (w).)[61]

The applications do not specifically identify Worley, a resident of Asheville, with Local 96. However, of the five contractors forming his employment experience all were identified by Worley as union.[62] While TVA is listed, and Criddle admits to knowledge that TVA recognized unions, the evidence is deemed insufficient to warrant an inference that other listed employers were known or suspected by the Respondent's representatives as union, or that his employ-

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[58] The position sought is not discernible from the application. Adams was not asked to identify the job he sought. My finding in this regard is based on the position taken by the parties in their briefs.

[59] The Plumbers Union is often referred to as the ''U.A.'' However, one reading the application could misread the handwriting as ''V.A.,'' and as a reference to training sponsored by the Veterans' Administration. In this light, I am unwilling to assume that the Respondent's officials would have construed this entry as having union connotations.

[60] For this reason, there is no merit in the General Counsel's observation that on June 3, 9 days earlier, Danny Ledford was hired as a pipefitter. On the face of the record, the Respondent was given no notice, and had no reason to adduce proof as to why it preferred Ledford to Adams. In this connection, I note that GCX-5 indicates that a Daniel Ledford, a former B E & K employee was hired on February 27 as a pipefitter.

[61] Criddle testified that, according to her evaluation of these applications, Worley's pipefitting experience actually was limited to about 6 months, and that Worley, instead, was basically a structural welder.

[62] Although the General Counsel adduced testimony that Worley's health history was the ''same'' on both applications, there are significant differences. On both applications Worley did acknowledge his high blood pressure. However, his June application omitted the fact that he had a heart condition and operation, both of which had appeared on his January application.

ment history suggested he presented a threat to the merit shop policy.

Apart from this deficiency, the General Counsel urges that I find that Worley was a victim of discrimination because on January 21 the Respondent hired Stephen Warren as a pipefitter/welder. This entails a material departure from the complaint which places the discrimination on either of three dates: March 18, June 12, and July 29. The Respondent's defense relates exclusively to those dates and assumes that the operative application was that filed on June 4. The Respondent had no reason to proceed on any other assumption. It by no stretch of the imagination was obligated to explain a hiring taking place 5 months earlier. Evidence indicative of any discriminatory motive is lacking, and the allegation concerning the bypass of Worley is dismissed.

(17) *Mark Holt*. The complaint alleges that Holt was discriminated against on June 12. His application is dated May 2. (GCX-3(x).) It sought work as a ''top helper.'' His application lists no training or skills in welding or pipefitting. In shows that in his most recent four jobs, dating back to 1984, he served exclusively as a ''laborer foreman.'' Although in the ''special skills'' section, Holt noted: ''All types of construction,'' the specific data set forth in the application are insufficient to support an allegation of discrimination based on the refusal to hire any helper position in the pipefitting and pipewelding classifications. Indeed, the General Counsel has failed to identify any specific vacancy filled by the Respondent within 60 days after May 2, but within the period of discrimination encompassed by the complaint, for which Holt would be qualified.[63]

Moreover, from his recorded employment history, there is no basis for inference that any representative of the Respondent would either recognize the listed contractors as union or suspect that this was the case.[64]

Based on the foregoing, it is concluded that the record in Holt's case does not in the least suggest either that he was passed over during the period after June 12, or that, if he was, that union activity was to any extent a factor. The instant 8(a)(3) allegation is dismissed.

(18) *Joseph Snow*. The complaint alleges that Snow was wrongfully denied employment since on or about July 29. His application dated July 23 sought worker as a pipefitter. (GCX-3(t).) He claims that all five contractors listed on his application are union.[65] However, it does not reflect that he had worked as a pipefitter since August 1988. His entire employment record, which dates back some 28 years, shows a work history as a fitter totaling only 15 months. The remaining 26 years the application indicates that he served as a supervisor, but without defining the specific area of responsibility.

The General Counsel claims that the Respondent should have preferred Snow over Michael J. Davis, who was hired on July 29, 1991. Davis had worked with the tools over the last 2 years as a pipefitter. (GCX-4(w).) Criddle credibly testified that Davis was hired on request of a B E & K pipe foreman, Butch Fox.[66] She also testified, generally, and understandably that she was reluctant to hire one with extensive supervisory experience because, as journeyman, they are frequently dissatisfied and tend to agitate for advancement. Moreover, the Respondent's preference for those whose skills were put to recent use, and whose ability had been affirmed by staff personnel, were legitimate, nondiscriminatory grounds for selecting Davis over Snow. Accordingly, while not persuaded that the General Counsel has made out a prima facie case of discrimination, I would, in any event, conclude that the Respondent has demonstrated that it would not have hired Snow had he lacked union ties. The 8(a)(3) allegation in this respect is dismissed.

(19) *Phillip Hubbard*. Hubbard applied for a pipefitter position on May 7 and July 25. (GCX-3(dd) & (ee).) The complaint alleges that he was discriminated against on July 30. He was not questioned, generally, as to the organized status of his past employment. His application does reveal that he had worked for TVA, the firm that Criddle knew to be partially organized. Hubbard was last employed at that location in 1980. There is no basis for concluding that the remaining employers listed on Hubbard's application were known or suspected by the Respondent's agents to be union.

The General Counsel claims that the case of discrimination is substantiated by the Respondent's hiring of Archie Wilde. The latter was apparently hired on July 30. However, as the General Counsel acknowledges in his brief, Wilde was hired in classification #29, the pipe welder position. (GCX-5 and 4(n).) Thus, Wilde was hired for a job different from that sought by Hubbard. Moreover, the General Counsel has not pointed to any vacancy in the pipefitter classification that should have been filled by Hubbard.[67]

Absent evidence that a vacancy was available on the date of discrimination set forth in the complaint in the position sought by Hubbard, there is no basis for concluding that he was denied employment on that date. Accordingly, there is no basis for inference that any failure by the Respondent to act on his application was based on proscribed grounds. Accordingly, the 8(a)(3) allegation in this respect is dismissed.

E. *Cases 11–CA–14332 and 11–CA–14553*

The General Counsel and Respondent agree that during the period relevant to this proceeding only seven persons were

[63] This case at all times was litigated on the theory that the Respondent had violated the Act by preferring others to union applicants in filling jobs allied with the pipefitting and pipe welding crafts. To that end, the parties stipulated to GCX-5, a listing of those actually hired in such positions. As pointed out by the Respondent, this document fails to show that it hired anyone to a helper position during the period relevant to the Holt allegation.

[64] Holt testified that Morrison-Knudsen was a union contractor for whom he worked in Illinois and Wisconsin on two occasions. Criddle admitted that she was aware that this contractor was union. However, the application, merely lists the firm as ''M & K,'' an unrecognizable pseudonym. I am unwilling to attach any significance to this vagary.

[65] There is no basis for inferring that any of the Respondent's agents would have known or suspected on reading Snow's application that his employment history was in whole or in part on unionized jobs.

[66] Fox was listed as a reference on Davis' application.

[67] By way of defense, the Respondent assumes that the hiring of Michael J. Davis was targeted here. However, Davis was hired as a pipefitter on July 29. GCX-4(w). The General Counsel did not mention Davis in connection with Hubbard, causing me to question whether the omission was deliberate—Davis was hired the day before the alleged discrimination against Hubbard. In any event, I cannot fault the Respondent for preferring the judgment and recommendation of a foreman over what appeared on Hubbard's application.

hired as journeyman electricians who lacked prior B E & K experience. Of this group, one was hired on November 5, 1990, prior to the earliest date on which any alleged discriminatee was denied employment. Thus, only 6 jobs are placed in issue by the sector of the complaint alleging discrimination against 40 qualified electricians with ties to Local 238, or some other labor organization.[68]

The individual allegations are analyzed below:

(1) *Clifford Boone*. The complaint alleges that Boone was unlawfully denied employment on December 3, 1990. His application was filed on November 27, 1990. (GCX-103(a).) The application lists four contractors as employment references, all described by Boone as union, including ''Bechtel.'' The wage rates in his last two employment stints were in the vicinity of $17 per hour or greater. The application lists Jerry Rogers as a personal reference, but identifies him only as an ''electrician'' from Enka, North Carolina.

There is insufficient basis for suspecting that the Respondent's handling of this application was accompanied by knowledge or suspicion of Boone's union affiliation. I have already noted that the applicant's understanding and that of his union representative, as to who was and who was not a union contractor is not, ipso facto, imputed to the Respondent.[69] Nor did the reference to Jerry Rogers, which was devoid of any suggestion that Rogers was in any sense connected with the Electricians Union, convey any special meaning.[70]

Moreover, even were the requisite knowledge inferable, the prima facie case would fail. The application contains no information suggesting that Boone's employment would be incompatible with the merit shop philosophy, and past employment on union jobs, would not demonstrate such a conflict, even if known. The 8(a)(3) allegation concerning Boone is dismissed.

(2) *Lowell Stipe*. Stipe was allegedly bypassed for discriminatory reasons on January 2. His application is dated December 4, 1990. From it, the Respondent would have recognized that his experience in the construction industry was limited to a 3-month stint. This single job, described by Stipe as union, carried a rate of pay of only $12 per hour. While there would be no reason to assume that the Respondent would have known or suspected that the listed contractor was union, the balance of Stipe's employment history shows a consistent pattern of nonunion employment, outside of the construction industry, thus, suggesting minimal credentials as a journeyman.

On the face of the application, the information available to the Respondent when it declined to hire Stipe fails to even arouse a suspicion that union affiliation was involved. It is concluded that the General Counsel has failed to establish a prima facie case and the 8(a)(3) and (1) allegation in his case is dismissed.[71]

(3) *Frank Edwin White*. It is alleged that this applicant also was denied employment unlawfully on January 2. His application was filed on December 11, 1990. (GCX-103(e).) It does not reflect any employment in the construction industry. The General Counsel does not argue or suggest that he was more qualified than anyone hired by the Respondent on the critical date, or, for that matter, at anytime. The General Counsel contends that a link with unions would derive from White's employment with Southern Bell Telephone and Telegraph, where in 1984, he retired after 34 years. White described that he was represented in this job by an affiliate of the Communication Workers of America. However, his application lists his job merely as ''Ca. Rep Tech.'' Even if I were inclined to accept that the Respondent harbored resentment toward unions generally, including those that presented no organizational threat, I would not find that his employment was described in the application in a fashion that would lead to the assumption that it was part of a bargaining unit represented by a union. The allegations of discrimination in his case are dismissed.

(4) *Julian M. Buchanan*. On May 20, Buchanan was hired by the Respondent on an application filed on May 7. (RX-100.) Nevertheless, the complaint alleges he was a victim of discrimination earlier on January 8, 14, and 21. His initial application is dated January 8. (GCX-103(f).) An attached resume claims 10 years' employment in the construction industry as an electrician, specifying that he holds a journeyman card from Local 238, IBEW. It goes on to show work for contractors at lumber mills, including those operated by Champion. Twice he worked for B E & K at Champion mills in two different States.

In this instance, I find that the General Counsel has made out a prima facie case of discrimination. The resume mentions Buchanan's union membership in the local Electricians Union as a positive factor in a manner, likely to suggest that Buchanan took pride in his union ties and was likely to act on his allegiance to Local 238. Moreover, despite the pref-

[68] At various stages of the hearing, allegations naming Steven W. Duell, Steven C. Foster, Walter Blythe, and Robert McWilliams, on request of the General Counsel, were deleted from the complaint. In addition, the General Counsel insisted on pursuing allegations on behalf of subpoenaed beneficiaries of the complaint who did not appear to testify in support of their cause. To further that effort the General Counsel requested that I receive applications bearing their names because all were furnished by the Respondent pursuant to subpoena. This merely establishes that such documents were filed; it does not confirm the authenticity of these documents as having been actually signed, completed by and filed in person by any these alleged discriminatees. The General Counsel requests that I reverse this ruling, but ignores the basis for it, thus, failing to provide me with any acceptable justification for avoiding reversal were he to now cast aside the fundamental deficiency in the proffer. The allegations pertaining to Timothy Abernathy, George Barger, Larry Billingsley, Edwin Little, and Arthur Pilkingston, are dismissed as totally unsubstantiated.

[69] As was typical of the alleged discriminatees, Boone's foundation was based on knowledge from his own employment, and he was unaware whether his past employers operated elsewhere on a nonunion basis.

[70] I would have found otherwise had this application been filed after January 23, 1991, when Rogers status with Local 238 was clearly revealed in his letter of that date to Bill Redmond. GCX-106(a).

[71] The consistent maintenance of this allegation flirts with frivolity, but as a tactical matter poses a threat to other, more experienced and hence more deserving of the alleged discriminatees. Thus, Stipe is one of four named in the complaint allegedly discriminated against on January 2. Yet, all are vying for the same vacancy because the Respondent hired only one applicant on that date who lacked prior B E & K experience. Thus, if the General Counsel were able to fool me on Stipe, this applicant, irrespective of any superiority in the experience record of other named discriminatees, would share equally in the backpay remedy with any others rightfully found to have been unlawfully denied hire on this date.

erences accorded to applicants with prior B E & K employment, in lumber mills generally, and at the Champion mill in Canton in particular, all of which were evident from Buchanan's filing, the Respondent overlooked its own criteria when the Respondent hired Garland Payne on January 14. (GCX-107(d).) Payne not only was lacking in these preferences, but his last job included supervisory experience, thus placing him in a category shunned by Criddle.

On the foregoing, it is concluded that the Respondent has failed to establish that Buchanan would not have been hired on January 14 had he not openly communicated his ties to Local 238 in applying for work.[72] Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) by not hiring Buchanan on that date.[73]

(5) *William L. Hunter*. As in Buchanan's case, the complaint alleges that he too was denied employment wrongfully on January 8, 14, and 21. Hunter sought work on January 8. (GCX-103(g).) His application specifically references ''Local 238.'' He listed employment with four contractors, describing only two as union. The application was completed in a fashion that does not list the years in which he was employed on any particular job. In any event, the reference to Local 238 was brandished gratuitously, and again under conditions that flaunt union membership. I am inclined to infer that the Respondent would be wary of such a representation, and that union considerations were at least a part of the motive for not hiring Hunter for the vacancy that was filled on January 14.

As indicated, that job was filled by Garland Payne. (GCX-107(d).) Although the Respondent would fault Hunter because of his supervisory history, Payne was not insulated from this flaw, and in light of the General Counsel's prima facie showing of discrimination, there is nothing in Payne's background that convincingly demonstrates that he would have been preferred had Hunter remained diffident about his union membership. Thus, the Respondent has failed to meet its burden, and I find it violated Section 8(a)(3) and (1) of the Act by failing to hire Hunter on January 14.

(6) *Robert Edward Simmons*. Simmons is another candidate for the job filled by Garland Payne. The complaint alleges that he too was denied employment based on union considerations on January 8, 14, and 21. His application was filed on January 8. (GCX-103(h).) It incorporates a claim to 25 years' experience in electrical work. It lists three prior employers, all described by Simmons as union.

More importantly, from Simmons' personal references, it would take little imagination to deduce that this electrician had a long history of coveted union membership. Jerry Rogers is named at the very top, and specifically identified as:

Business Mgr.
L.U. 238 IBEW

The application goes on to signify that Simmons has known Rogers for 38 years.

Next, Simmons referenced Al Keisling, whom he specifically identified as:

Business Mgr.
L.U. 934 IBEW

Finally, Simmons listed J. J. Barry, identifying him as a resident of Washington, D.C., holding the following position:

international pres
IBEW

Anyone reading this application would conclude that Simmons was intent on advising this nonunion employer of his longstanding relationships with individuals whose personal philosophy and life-long endeavors, obviously, are at war with merit shop employers, and vice versa.[74] In this light, it is concluded that this application would have been cast aside by the Respondent's representatives, at least in part, because of the applicant's demonstrable ties with the Electricians Union. It is an inference sufficient to shift the burden to the Respondent to demonstrate that Simmons would not have been hired in any event.

Payne was hired by the Respondent on January 14. Two items stand out on the face of Simmons application: (1) his claim of 25 years' electrical experience, and (2) his union ties. Payne's application reflects neither, and it is safe to conclude that relative experience was not the factor that persuaded the Respondent to hire Payne. In the final analysis, it is determined that the Respondent declined to further explore Simmons' professed abilities in filling the January 14 vacancy because of his claimed associations with union officials dating back for over three decades. The Respondent violated Section 8(a)(3) and (1) in this respect.

(7) *Samuel Whitaker Jr*. Whitaker's application also was filed on January 8. (GCX-103(h).) The complaint alleges that he too was denied employment unlawfully on January 8, 14, and 21, and, hence, the job filled by Garland Payne on January 14 is also the focus of this allegation. All contractors listed on the application were described by Whitaker as union. Consistent therewith, his application lists Jerry Rogers as a personal reference identifying the latter as ''LU. 238—Business Manager.'' It was part of a pattern appearing in applications in quest of work as journeyman electricians filed that day and it is entirely unlikely that those processing applications on January 8 would have overlooked this phenomenon or dismissed it as coincidental.

In Whitaker's case, the complaint also alleges that he was again denied employment on July 24 for union reasons. Prior thereto, he filed applications on April 30 and June 25. The former indicated that he received training through the IBEW,

[72] The measure of proof required is not met by the representation in the Respondent's posthearing brief that Criddle ''apparently'' overlooked Buchanan's prior B E & K experience. For she did not testify to this effect. Nor did Criddle testify that her favoring employees of Daniel Construction outweighed the multiple preferences evident on the face of Buchanan's application.

[73] Although it appears that the Respondent hired Doyle Ledbetter on January 21, Criddle credibly testified that, consistent with a notation on the foot of his application, a job was committed to him much earlier on January 6, prior to Buchanan's filing. In this light, there being no other electrician position filled on or about January 21, no additional violation is found as to that date.

[74] It is not necessary to consider the personal relationships with union functionaries identified by Simmons on an application filed earlier on November 6, 1990. GCX-103(i). It also is unnecessary to give weight to Simmons' testimony that each time he applied he wore IBEW insignia.

and, as special skills, included ''union organizer'' along with his occupational experience. (GCX-103(k).) Jerry Rogers was again included as a reference. The operative application was filed on June 25. (GCX-103(l).) Under special skills it stated as follows:

> 4 years I.B.E.W. Apprentice School,
> Motor Control School Switchbored [sic] &
> Panel Board Layout & Wireing, Blueprint
> Reading School
> Vol. Union Organizer

Jerry Rogers was listed as a reference, with the description, ''I.B.E.W. Business Manager.''[75]

The record also shows that while Whitaker's viable applications were pending, the Respondent filled vacancies on January 14 and July 24. Based on these applications, the Respondent did so while possessed of facts including Whitaker's professed standing as a ''union organizer,'' which on an employment application seeking work with a nonunion firm, would hardly be regarded as idle comment. In short, his application communicated a bent toward trade union goals irreconcilable with the merit shop philosophy. An inference is warranted that the failure to hire this apparently experienced electrician on either date was at least in part attributable to the Respondent's implementation of its merit shop philosophy.

At the same time, the Respondent has not disassociated its failures to hire Whitaker from union considerations. As was true of discriminatees Buchanan, Hunter, and Simmons, the application endorsed by the hiring of Payne on January 14 does not on its face persuade that Whitaker would not have been hired had his union associations been withheld. Indeed, Payne's having held a supervisory post suffers from the same flaw as discussed below in connection with the vacancy filled on July 24. Accordingly, it is concluded that the Respondent Section 8(a)(3) and (1) of the Act by failing to hire Whitaker on January 14.

The same result is reached in connection with July 24. On that date, the Respondent hired Michael Woods as an ''electrician.'' I cannot fault the Respondent's expositions concerning the credentials reported on Woods' resume and application. (GCX-107(f).) Nevertheless, the Respondent in other areas defended on grounds that Criddle ''prefers not to hire applicants with extensive foreman or supervisory experience for journeyman positions.'' Woods was hired as a journeyman. His application shows that in three of his last four jobs, Woods was employed as ''electrical foreman.'' His resume claims 16 years of ''Direct Supervision.''[76] There is no explanation on this record for the hiring of Woods to a journeyman slot in light of this drawback in his work history. Accordingly, the defense has suffered a failure of proof, and I find that the Respondent violated Section 8(a)(3) and (1) by failing to hire Whitaker on July 24, as well.

(8) *Alvin E. Wyatt*. The complaint alleges that Wyatt was victimized by a discriminatory refusal to hire on January 10, 1991. The allegation rests on an application filed that same day. (GCX-103(m).) It lacks reference to any labor organization or union official. The General Counsel's claim stands on the fact that of the five employers listed on the application, all were identified by Wyatt as union. One firm, Hayes & Lunsford has operated nonunion since 1988. Of the remaining four, three jobs were far beyond the jurisdiction of Local 238, being in Ohio, Iowa, and Wisconsin. In this light, I see nothing on the face of this application that reasonably could be construed as associating this applicant with any threat to the Respondent's merit shop philosophy, and, for that reason, believe it unreasonable to infer that his nonemployment was, to any extent, attributable to union considerations. The 8(a)(3) allegation in his case shall be dismissed.

(9) *Howard T. Newman*. July 24 is the date of discrimination alleged in Newman's case. Of the three applications filed by Newman, that completed on July 18 is determinative. (GCX-103(n).) Here again, the claim of discrimination stands on interpretation of the listed employment references; otherwise the document is devoid of reference to or mention of any union or union official. According to Newman, the three listed employers were all union. Even if the Respondent would agree, I am unwilling to assume on an ipso facto basis that past employment on union projects alone would inspire a discriminatory bypass. To reiterate, in this case, the evidence of animus, itself inferred, has meaning only in those cases where the Respondent may be charged with reason to believe that the hiring of the applicant would create a risk to its nonunion method of operation. Something less, absent clearer evidence of hostility than presented here, would not reasonably support an inference that a refusal to hire was partially motivated by proscribed considerations. Accordingly, as the requisite evidence is lacking in Newman's case, the General Counsel has not made out a prima facie case, and the instant 8(a)(3) allegation is dismissed.

(10) *Charles E. Phillips*. The date of discrimination set by the complaint in this case is also July 24. The operative application was filed on June 25.[77] It identifies Phillips as a journeyman electrician with 13 years in commercial and industrial construction. It also suggests that his special skills include: ''union organizer.'' Jerry Rogers is identified as a personal reference and as ''Business Manager, I.B.E.W. LU 238.''

Phillips was among those passed over when on July 24 the Respondent hired Michael Woods as an ''electrician.'' (GCX-107(f).) It did so while possessed of information deliberately placed on Phillips employment application that was readily recognizable as a threat to the Respondent's nonunion philosophy. For the reasons stated in the case of Sam Whitaker, I find that the General Counsel's prima facie case is not rebutted by persuasive evidence that under Criddle's criteria, Woods would have been hired over Phillips even if the Respondent were unaware of his union affiliations and status. Thus, the Respondent violated Section 8(a)(3) and (1) of the Act on this date as well.

(11) *Terry Layn Cole*. Pursuant to the complaint, Cole was also a candidate for the vacancy filled by Woods on July 24. His application dated July 18 indicates that he was trained as an electrician under the auspices of Local 760. Beyond

[75] As indicated, Respondent's officials Evans and Redmond, and probably Criddle as well, would have had first hand knowledge as to Rogers identity well prior to the filing of Whitaker's April and June applications.

[76] See Respondent's posthearing brief, Br. 15, fn. 29.

[77] GCX-103(p). See also GCX-103(o), being an application filed by Phillips on April 30.

that there is no direct expression of union affiliation. (GCX-103(r).) His employment references are dominated by jobs with T.V.A., which was generally known to have operated under union contracts. Nevertheless, off-handed references to union training—presumably acquired many years earlier—together with past employment on union jobs outside the jurisdiction of the local craft union, are not in and of themselves antithetical to acceptance of the open-shop philosophy. And such evidence will not alone support an inference that a refusal to hire was partially motivated by proscribed considerations. Thus, as in the case of Howard Newman, the General Counsel has failed to meet the initial proof responsibility assigned by *Wright Line*, supra, and the 8(a)(3) allegation based upon the refusal to hire Cole is dismissed.

(12) *Stuart Gwyn*. The complaint in Gwyn's case also eyes the July 24 hiring of Michael Woods. Gwyn applied on July 18. (GCX-103(t).) His application shows that he was trained under the auspices of an IBEW apprenticeship. It also lists employment dominated by what Woods describes as union jobs. All, however, involved projects outside the jurisdiction of Local 238. For the reasons expressed above in the case of Terry Cole, I find that these factors do not add up to a prima facie case of proscribed discrimination, and that the failure to hire Gwyn on July 24 did not violate Section 8(a)(3) and (1) of the Act.

(13) *Perry Ledbetter*. The complaint, as amended, alleges that the Respondent unlawfully refused to hire Ledbetter on or about January 10. Thus, he is among a score of alleged discriminatees competing for the proceeds of the vacancy filled by Payne on January 14. Here again his application is dominated by employment that he describes as union,[78] with attachments that signify that in 1982, Ledbetter completed a joint apprenticeship sponsored partially by the IBEW. (GCX-103(v), (x), & (y).) Otherwise those documents, are devoid of specific linkage with any union. (GCX-103(V).) Accepting the difference in timeframe, the allegation on behalf of Ledbetter is deficient for the same reason expressed above in the case of Stuart Gwyn. His training 8 years earlier and employment on union jobs would not substantiate the initial inference required of the General Counsel, and the allegations in his case are dismissed as well.

(14) *Joseph C. Stellitano*. This case also falls within the mold evident in the case of Gwyn and Ledbetter. It focuses on the Respondent's hiring of Payne, with discrimination alleged on or about January 8, 14, and 21. (GCX-103(z).) The only specific tie with the Electricians Union evident on the face of the application lies in Stellitano's reference to his completion of an ''I.B.E.W. Apprenticeship'' some 9 years earlier. He describes five listed jobs as union, all save one involved work in Indiana, California, and Florida. None were performed within Local 238's jurisdiction. For the reasons given in the substantively indistinct cases of Gwyn and Perry, I find that the General Counsel has not made out a prima facie case as to Stellitano and the 8(a)(3) allegation in this respect is dismissed.

(15) *Gene Trammell*. The complaint alleges that Trammell was unlawfully denied hire on July 24, the same date that the Respondent hired Michael Woods. Trammell's application was filed on May 30. (GCX-103(aa).) The training he describes on that document by no means would be understood as either associated with or sponsored by the Electricians Union. He claims that all but two of the listed employment references involved union jobs.[79] Here again, the evidence available to the Respondent was too limited to support a reasonable inference that it would react negatively to this application, in whole or in part, on the basis of union considerations. The allegation is dismissed.

(16) *Malcolm Bentley*. Bentley is also vying for the vacancy filled by Michael Woods on July 24. His application was dated May 30. (GCX-103(bb).) He describes all contractors listed as union. While there is nothing on the face of the application that specifies any relationship with the Electricians Union, Bentley testified that before applying, he went to the union hall, where Jerry Rogers made a photocopy of his union card.[80] Bentley admits that he did not attach the card to the application before depositing it, but states that, without alerting the personnel clerk, he merely ''laid it'' with the application. When asked by me as to where he got the idea to submit the union card, Bentley replied, ''Well Jerry's I guess.'' Bentley's uncorroborated testimony did not ring true. While many filed after consulting Rogers, no one else attributes such a suggestion to the latter. Several knew just how to incorporate data that would identify them with the Electricians Union on their respective applications, and surely, Rogers was acutely aware of these techniques and would have counseled Bentley to attack the matter directly if asked, or if his advice were volunteered. Bentley is discredited and, for reasons heretofore stated, the evidence appearing on his affidavit is insufficient to support the initial inference required before any proof responsibility is incurred by the Respondent. The allegation in his case is dismissed.

(17) *James Murgil Johnston*. The complaint alleges that Johnston was wrongfully denied employment on January 8, 14, and 21, and July 24. Thus, the hirings of both Payne and Woods are placed in issue. The operative applications filed on January 8 and July 23, detail a variety of electrical skills held by Johnston. (GCX-103(dd) & (ee).) That filed on July 23 indicates that he worked for 3 years at Champion's mill in Canton. Both contain specific evidence of his association with Local 238. The July 23 application recites that he completed the IBEW-NECA apprenticeship in 1984, and, as personal references, they include Jerry Rogers. He states that he had been associated with Rogers for 11 years. The latter is described in both as ''Business Manager IBEW LU. 238.'' In addition, the July 23 application includes the following inscription:

[78] GCX-103(w) was received, but since filed after the period of discrimination is of no relevance.

[79] Of those, only one was performed in North Carolina. Trammell appeared to lack first-hand knowledge that this was a union contractor. His pay level at the time hardly instills confidence in his testimony. Thus, on that job, he earned only $11.75 hourly, a rate lower than the two nonunion jobs he performed that same year in the Carolinas.

[80] The card was received in evidence as GCX-103(cc). However, it was omitted from the exhibits filed with the Division of Judges. Efforts to secure the document have proven fruitless.

Have 11 years experience
as an IBEW electrician

As in the case of Samuel Whitaker Jr., it is concluded that this brazen revelation made in the context of application for nonunion work is suggestive of alliances inconsistent with the merit shop philosophy.[81] In the circumstances, it is reasonable to infer that at least ''a'' part of the motive for not hiring this skilled applicant in filling vacancies on January 24 and July 14 was the Respondent's perceived need to implement, preserve, and protect a method of doing business antithetical to collective bargaining.

As for the Respondent's burden, it does not suffice that the applications of Payne and Woods show longer service in the electrical industry. Both are flawed by past employment in a supervisory post, a factor used by Criddle to reject applicants. If in their cases, other factors prevailed, any judgment in that regard could not be ascertained from the applications themselves.[82] The failure to present testimony in this regard precludes a finding that Johnston would not have been hired even if he did not convey his union interests, and, accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by rejecting Johnston's applications on January 14 and July 24.

(18) *Michael L. Martin*. This allegation also relates to the July 24 hiring of Michael Woods. Martin filed his application on July 23. It shows that he completed an ''IBEW'' apprenticeship in 1972 and that from 1969 to 1984 he worked out of the ''IBEW'' in Parkersburg, West Virginia. Since then, he worked only for nonunion contractors at rates ranging between $9 and $9.75 per hour.

The Respondent is entitled to benefit of the doubt. I am inclined to believe that these wage rates would be recognized as nonunion, and on balance it is more rationally inferred that the Respondent's would so understand, while having no concern that Martin might present a threat of organization. It is concluded that the application is that of a worker who would be taken as receptive to nonunion employment, and fails to warrant an inference that employment was denied, to any extent, on the basis of proscribed considerations. The 8(a)(3) allegation is dismissed.

(19) *Sewell E. Strickland*. Strickland allegedly was unlawfully denied a job on January 2. The operative application was filed on November 29, 1990.[83] The application fails to include any specific reference to a labor organization. The employment record includes no jobs within the geographic jurisdiction of Local 238. The General Counsel's initial burden stands solely on Strickland's testimony that the four contractors listed on his application were union. For reasons, heretofore indicated this does not suffice to shift the onus to the Respondent, and by reason of this failure of proof, the complaint is dismissed as to Strickland.

(20) *Roy Evans*. The complaint alleges that Evans was victimized on January 17 and July 24. Evans filed on January 17. The record contains no evidence that anyone, without B E & K experience, was considered for employment during the period pertinent to this application. (GCX-103(ii).) There is no evidence to support a violation in this period and the 8(a)(3) allegation is dismissed in this respect. See, e.g., fn. 73, supra. (GCX-107(e).)

A second application was filed on July 9. (GCX-103(jj).) The employers listed in this and all other applications filed by Evans were described in his testimony as union. More importantly, under special skills, that document states, ''L.U. 18, I.B.E.W.''[84] The reference is an abstraction, unrelated to an inquiry, and, considering the fact that Evans was knowingly seeking nonunion work, it would naturally be taken by the Respondent's employment representatives as a declaration of allegiance. Accordingly, I am inclined to find that an inference is warranted that his application was rejected at least in part to avoid challenge to the Respondent's nonunion status. Moreover, since Garland Payne was hired in the face of a recent stint as supervisor, and this flaw is left unexplained by Criddle, the Respondent has failed to rebut the inference of discrimination. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) by rejecting Evans in filling the July 24 vacancy.

(21) *Ronnie B. Reese*. The complaint alleges that the Respondent unlawfully denied employment to Reese on January 8, 14, and 21, thus challenging the January 14 hiring of Garland Payne. This allegation is complicated by a lost or misplaced application. For the most part, applications furnished by the Respondent pursuant to subpoena have provided for the General Counsel's proof. In this instance, the Respondent concedes that Reese filed an application on January 8, but that it has been unable to locate the document. Through Reese, the General Counsel seeks to resurrect its content.

Reese confessedly had no independent recollection of the employers listed in his application. Moreover, though he maintained a written record of the various jobs he worked, he appeared without the document.[85]

Even had Reese limited his application to contractors that he understood to be Union, this alone, for reasons already stated, would not substantiate the General Counsel's initial proof responsibility under *Wright Line*. As there is no evidence that the Respondent could have been aware on any other grounds that Reese had ties with Local 238 or any

[81] The foundation for this inference is not weakened by the January application's indication that Johnston worked for Hayes and Lunsford between 1980 and 1990. Even if one were to accept the testimony that this firm converted to nonunion status in 1985, this change would not alter the evident employment on a union basis by that firm for a considerable span. In any event, there is no evidence that Criddle was mindful of this innovation.

[82] The Respondent's brief depicts Johnston as unreliable because his applications show that he, on several occasions, left jobs for higher pay. There could be no quarrel that, if acted on, this would provide a legitimate ground for disqualification. However, there is no evidence that Criddle would have reacted in this fashion to a qualified craftsmen. It is a matter to be established by testimony, rather than assumption or argument.

[83] GCX-103(hh). The only vacancies in that time frame were filled by the hiring of Keith Waldroup on January 2, Doyle Ledbetter on January 6, and on Garland Payne on January 14. A second application was filed by Strickland on January 15. GCX-103(gg).

[84] In his earlier application, Evans had signified that he completed an IBEW apprenticeship.

[85] He initially testified with one exception he always worked for union contractors in the electrical industry. The exception was a manpower broker that he did not list on the application. When confronted with his affidavit on cross-examination, Reese admitted to employment with two nonunion electrical contractors in the Asheville area. He also admits to employment, also in Asheville, with Hayes & Lunsford, which has been nonunion for several years. He adds that these were listed on his application.

other affiliate of the Electricians Union, the allegation of discrimination in his case is dismissed for want of proof.

(22) *Robert Dale Faught*. The complaint alleges discrimination in Faught's case on January 21, the same date that he filed his application. (GCX-103(kk).) Even assuming that the General Counsel has satisfied its initial proof responsibility in this instance, the record establishes that Faught would not have been hired in the absence of any union activity. Thus, in evaluating the claim of Julian Buchanan, I have heretofore credited Criddle's testimony that no vacancy was filled on January 21, as the job in question was committed to Doyle Ledbetter on January 6. See fn. 73, supra. (GCX-107(e).) Accordingly, as there is no evidence that the Respondent hired a single applicant who lacked B E & K experience during the ensuing 60 days, the 8(a)(3) allegation has been disproven and is dismissed.

(23) *Larry Douglas Bailey*. Maintenance of the claim on behalf of Bailey strikes as a senseless exercise. His application was dated January 15. (GCX-103(ll).) It shows that he performed electrical work on one occasion for a period of 4 months, and a second, where, during a 1-month period he claims to have worked as an electrical foreman. It does not appear that he ever worked in that craft on a union job, and in fact he was never a member of the Electricians Union. This background, coupled with the fact that Bailey was a former employee of B E & K, yet not hired, would unmistakably reveal that it was his limited qualifications as an electrician that prompted inaction by the Respondent in this instance.

Moreover, this case is substantively identical to that of Faught. For the reason stated as to Faught, the Respondent has established that no applicant who lacked B E & K experience was considered for employment on January 15 or any other date during the ensuing 60 days.[86] The absence of a vacancy is an additional factor deflating any claim of detrimental action against Bailey during the term of his application. The 8(a)(3) allegation in his case is dismissed.

(24) *Leslie Silvers*. The complaint alleges that Silvers was wrongfully denied employment on January 8, 14, and 21. His application is dated January 8, placing him among the candidates for the vacancy filed on January 14 by Garland Payne. (GCX-103(mm).) Any inference of discrimination that might arise on the face of this application would derive from the fact that his reported employment history, for the most part, was on union jobs, including T.V.A., an employer known by Criddle to perform work under contract with unions. However, any concern for union linkage would have been weakened by his nonunion employment between 1985 and 1990 with a firm that previously worked union. In any event, even if the Respondent was mindful that Silvers had accurately portrayed the remaining contractors as union, his application does not tend to identify him as an organizational threat. Such being the case, I am unwilling to infer that the Respondent, to any extent, would have rejected his application on union considerations. The 8(a)(3) allegations in his case are dismissed.

(25) *Norris P. Dale*. Dale filed an application on May 30. (GCX-103(oo).) The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire him on July 24, the date that it hired Michael Woods. All of his former employers were characterized as union. His employment history reveals a pattern of wages noticeably higher than other discriminatees. Adjacent to the signature line is the comment, ''I have 20 yrs. with I.B.E.W. work experience.''[87] This gratuitous declaration, together with his wage rates in recent years, would convey that Dale's employment was a risk to the Respondent's nonunion philosophy, and warrant an inference that his application was not considered at least in part because of union considerations. Moreover, the absence of explanation as to the hiring of Woods, in light of his unfavored employment as a supervisor, betrays any basis for concluding that Dale would not have been hired to fill this vacancy even if he had not signified his union allegiance. The Respondent thereby violated Section 8(a)(3) and (1) of the Act.

(26) *Ralph Dean Hammer*. Hammer applied on January 15. (GCX-103(pp).) Based on the previously credited evidence that the Respondent committed a job to Doyle Ledbetter on January 6, it is concluded that this application would not support a violation as to any vacancy within the 60-day period after its filing. See fn. 73, supra. The 8(a)(3) violation in this instance is dismissed.

(27) *Robert L. Stanberry*. Relying on an application dated January 18, the complaint alleges that Stanberry was denied employment unlawfully on January 18 and 21. (GCX-103(qq).) For the reasons given above in the case of Ralph Hammer, the complaint is dismissed as to Stanberry.

(28) *Ernest Turbyfill*. The complaint alleges that Turbyfill was wrongfully denied employment on November 6 and December 5, 1990. He insists that he first filed an application on September 13, 1990. He claims that in doing so he was accompanied by Business Agent Jerry Rogers. Turbyfill claims that he next filed an application on November 6. He was again accompanied by Rogers; and another member of Local 238, Eddie Simmons.

The complaint alleges a discriminatory refusal to hire as of November 6 and December 12. Both are predicated on the November 6 application. As indicated, the document was not available, in fact, the Respondent argues that it never existed.[88] An attempt was made to reconstruct its content through Turbyfill's testimony. He also produced a copy of a written resume which he claims to have filed that day. (GCX-103(rr).)

I have heretofore discredited Turbyfill's uncontradicted testimony as to comments he attributed to Electrical Superintendent Redmond. His testimony as to his November 6 application was no more impressive. He initially testified that in that document he identified himself as a member of Local

[86] Contrary to the General Counsel, the Respondent has given a credible explanation ''as to why it did not hire Bailey on January 15, or any time thereafter.''

[87] Dale testified that he attached a copy of his dues receipt to his application. He claims that he had a copy of the document made at the union hall when he and Gene Trammell went there to get directions from Jerry Rogers. Trammell gave no indication that he took similar steps. I do not rely on Dale's uncorroborated testimony concerning the dues receipt.

[88] In furtherance of an attempt to discredit Turbyfill in this respect, the Respondent's brief erroneously represents that its daily application flow log does not reflect a filing by Turbyfill on November 6. On the contrary, that document does confirm that on November 6, 1990, Turbyfill appeared and filed application #002336. RX-3(e). I find that he did complete and file an application that day.

238, IBEW. When confronted with the fact that he included no such reference on the January 6 application, he retreated testifying that this was included on his resume but not the application itself. (RX-101.) Later, he would testify that the reference to union membership appeared on the September 13 application.

In any event, his testimony, together with the resume tends to confirm that Turbyfill's most recent employment in construction was with King Electric, a nonunion contractor. Moreover, prior to that, he had not worked as a construction electrician since 1984 when he was employed by Power Plant Maintenance.[89] Although the resume does imply that between January 1972 and January 1990, he was available for referral from Local 238, IBEW's hiring hall, this factor is reduced in importance by Turbyfill's actual employment record.[90] Accordingly, the General Counsel has not met his initial burden by credible proof, and the allegations of the complaint in this respect are dismissed.

(29) *Danny Vella*. Vella is another candidate for the vacancy filled by Michael Woods on July 24. The complaint places the violation on that date, with Vella's application having been filed on July 16. (GCX-103(ss).) It shows no specific ties with any labor organization. Five contractors are listed; Vella describes four as union. Of this group, two were located in Florida, and one in Wisconsin. Vella claims that he attached a resume to his application which showed his complete work history. (GCX-103(tt).) This document lists numerous contractors, with Vella describing only two as nonunion.[91] Here again, the General Counsel has produced no evidence furnishing any rational basis for assumption that the Respondent's hiring agents would recognize, by name, that the many contractors listed were union. I would agree, however, that the wages purportedly earned on most of these jobs would tend to confirm that they were performed at union scale to anyone with even marginal familiarity with construction industry rates. Nevertheless, for the reasons indicated, I am unwilling to conclude that the General Counsel has sustained its initial proof responsibility under *Wright Line* where union affiliation may only be gleaned by interpretation. While it is fair to assume that the Respondent would rise to the task as against those that brazenly showcase their union allegiances, thus leaving little doubt as to where they stand on the merit shop issue, a similar threat to that philosophy would not arise simply because an applicant's background includes employment on both union and nonunion jobs.[92] Accordingly, it is concluded that the Respondent did not violate Section 8(a)(3) in failing to hire Vella.

(30) *Billy R. Lewis*. Lewis is another candidate for the July 24 vacancy. The complaint dates the violation at that time, and the pertinent application was filed on July 18.[93] (GCX-103(uu).) His application shows no specific ties with any labor organization. From the witness stand, he described all of the listed contractors as union. Here again, the discriminatory inference would be founded exclusively on the interaction of union employment and the merit shop philosophy, which are not inherently incompatible, and in my opinion would not in all cases inspire a protective reaction on the part of B E & K. While it is possible, I am not willing to infer that nonunion employers will discriminate on this basis alone. The 8(a)(3) allegation is dismissed.[94]

(31) *Wayne Lewis*. The complaint alleges that Lewis was discriminated against on January 8, 14, and 21. No application was available corresponding to these dates. Lewis claims that he filed one on December 4, 1990. The General Counsel sought to reconstruct this document, using an application filed by Lewis on October 10, 1991. (GCX-103(vv).) Thus, Lewis' credibility is crucial to the fact of an earlier filing and its content.

In December 1990, Lewis was a resident of Pace, Florida, and assertedly a member of an IBEW Local out of Pensacola, Florida. He testified that he listed Gene Jernigan, his business manager, as a personal reference on the December 4 application. When asked by me whether the application identified Jernigan as the business agent, Lewis replied, ''Yes, Sir.'' However, when pressed, he relented somewhat testifying that he believed this to be the case. In his prehearing affidavit, given on April 4, 1991, he avowed, ''I listed Gene Jernigan as a reference and he is my BA. I do not know if I listed him as an electrician or BA.'' In his October 1991 application Jernigan was used as a reference, but merely identified as an ''electrician.'' It was my distinct impression that Lewis' initial testimony in this regard was a deliberate attempt to mislead as to a highly salient point that he knew or suspected would strengthen his case. The violation of the oath was sufficiently grave to warrant rejection of the balance of his uncorroborated testimony. There being no credible evidence that an application was filed at any time within 60 days prior to the dates of discrimination set forth in the complaint, the 8(a)(3) allegation in his case shall be dismissed.

(32) *Garcia L. Hudson*. Hudson allegedly was discriminated against on December 3, 1990. The only available application bearing his signature is dated January 15. (GCX-103(ww).) It seeks work as a ''J.W. Wireman.'' It shows no special skills, nor does it indicate that Hudson completed any form of vocational training or apprenticeship. As in the case of Wayne Lewis, the General Counsel used this document as an aid to reconstructing an earlier application, allegedly submitted by Hudson on November 27, 1990. Hudson denied, however, that he included any specific reference to his union

[89] This firm was described by Turbyfill's business manager, Jerry Rogers, as nonunion. If this testimony is accurate, the resume would not have reflected that Turbyfill worked union since May 1983.

[90] Moreover, although Criddle testified that she would not disqualify an applicant on the basis of an adverse health record, considering that reported by Turbyfill, which included a heart condition, high blood pressure, strained knee, impaired hearing, and shortness of breath, if Turbyfill were sincerely interested in employment, it is unlikely that he would would have included information that would have weakened his opportunity to just get a job.

[91] In addition, he admittedly was on the job when Hayes and Lunsford became nonunion.

[92] *J. E. Merit Constructors*, supra, 302 NLRB 301, 308 fn. 51 (1991). Were I to hold otherwise, I would find that the hiring of Woods furnished no defense, and hence that Vella would be entitled to share backpay with others whose discrimination is tied exclusively to the July 24 vacancy.

[93] Lewis claims that this was one of six that he filed without securing a job.

[94] As in Vella's case, were I to find a prima facie case, I would find that the Respondent has failed to show that Woods, considering his long tenure as a supervisor, was an appropriate alternative, and hence that Lewis, as well, would share backpay with others whose discrimination is tied exclusively to the July 24 vacancy.

affiliation. Moreover, on his January application, he tended to style his former projects with acronyms, rather than full names of the contractor—a practice that would have made it even more difficult for the Respondent's representatives to ascertain the nature of Hudson's past employment. In light of the foregoing, the alleged application fails to furnish any basis for inferring that union considerations were a part of the reason for not hiring Hudson. The 8(a)(3) allegation in his case is dismissed.

(33) *Howard Penley*. There is no documented evidence that Penley applied at any time. Nonetheless the complaint alleges that he was unlawfully denied employment on December 3, 1990. Penley testified that he filed an application on or about October 18, 1990. The Respondent's log of applicants for that date does not reflect that this was the case. (RX-3(b).)

In any event, Penley describes himself as a member of Local 379, IBEW, based in Charlotte, North Carolina. He testified that on the application in question he listed, as personal references, Lawrence Reynolds, his business manager, and Jerry Rogers, the business manager of Local 238, specifying their positions in the Union. Penley provided a prehearing affidavit that discussed the content of his alleged October 18 application in detail, including the issue of whether union affiliation was mentioned. There, Penley denied having done so. It contains no mention that Reynolds and Rogers were included as references. Penley's uncorroborated testimony is unworthy of belief.[95] Accordingly, the allegation of discrimination in his case is without credible basis and is dismissed.

(34) *Randall Monteith*. The complaint places the discrimination in this instance on July 24, the date that the Respondent hired Michael Woods. Monteith's application was filed on July 16. (GCX-103(xx).) He averred that all employers listed on that document were union. His rates of pay, with one exception, would not necessarily signal that he earned union scale. His special skills as an electrician were detailed. In his personal references, he listed Jerry Rogers, identifying him as business manager. This created a specific link sufficient to tilt the scales so as to require the Respondent to explain the failure to hire Monteith. By July 16, the Respondent's project manager, Randall Evans, had completed a round of correspondence initiated by Jerry Rogers efforts to obtain employment for those signing Local 238 referral books. As part of that exchange, Monteith was identified as an IBEW member in Rogers' letter of January 23, 1991. (GCX-106(a).) When Rogers attempted to further that effort by letter of February 18, 1991, he again specifically named Monteith as within the group. (GCX-106(c).) The fact the reply was by Evans, rather than a lesser official, and adopted a very terse, go away approach, suggests that the effort by Rogers was seriously viewed. (GCX-106(b) & (d).) Against this background, Monteith's specific reference to Rogers, was likely to reenforce the impression that Monteith remained a part of a real or imagined conspiratorial web on the part of Local 238 to gain a foothold on this job. Accordingly, it is inferred that the General Counsel has established that Monteith's openly professed association with Business Manager Rogers was at least ''a'' part of the motive for his bypass. Moreover, I find, for the reason stated above in connection with the case of Sam Whitaker, that the Respondent has not explained why Woods was preferred for the July 24 vacancy, thus, the Respondent violated Section 8(a)(3) and (1) of the Act as to Monteith as well.

(35) *Randy Cutshall*. The complaint alleges that Cutshall was denied employment unlawfully on July 24, thus, adding his name to the list of those competing for relief in consequence of the Respondent's hiring of Garland Payne on that date. He claims to have filed four applications with B E & K, including that filed on June 11, with an attached resume. (GCX-103(yy).) The five contractors listed on the face of the application were described by Cutshall as union. Only one on his resume was described as nonunion. Specific references to the Joint Apprenticeship and Training Committee as well as an attached certificate of completion which bears the IBEW seal would tie Cutshall unmistakably to the IBEW. However, neither an applicant's union membership nor employment on jobs described as union are strong enough in themselves to warrant unproven assumption that the Respondent would implement its merit shop policy by disregarding qualified applicants on this basis alone. Thus, the foregoing is deemed insufficient to support an inference that union considerations were a part of the motive for not offering employment to Cutshall. For this reason, it is concluded that the General Counsel has failed to sustain its initial proof responsibility and on that basis the 8(a)(3) allegation in this regard is dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 96, Plumbers Union and Local 238, Electricians Union are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent, on July 23, 1991, violated Section 8(a)(3) and (1) of the Act by refusing to hire James J. Loudermilk Jr. as a journeyman pipe welder by reason of his union affiliation.

4. The Respondent, on January 14, 1991, violated Section 8(a)(3) and (1) of the Act by refusing, by reason of union affiliation, to hire for the position of journeyman electrician the job applicants listed below:

Sammy Lee Whitaker Jr.
Julian Buchanan
William L. Hunter
Robert E. Simmons
James M. Johnston

5. The Respondent, on July 24, 1991, violated Section 8(a)(3) and (1) of the Act by refusing, by reason of union affiliations, to hire for the position of journeyman electrician the job applicants listed below:

Sammy Lee Whitaker Jr.

[95] As a diversion from the seriousness of this work, the argument made by the General Counsel to support Penley's credibility is fully quoted below. I do so out of light-hearted curiosity as to whether it was really meant to persuade:

> It is apparent that Penley did not know at the time he gave his affidavit the connotation of the word ''affiliation.'' How else can it be explained that he would get on the witness stand and make such an apparent blatant contradiction? Penley's testimony simply shows that he was being candid even to the point of appearing inconsistent.

Roy C. Evans
Randall Monteith
Norris P. Dale
Charles E. Phillips
James M. Johnston

6. The unfair labor practices found above are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except as found in paragraphs 3, 4, and 5 above, the Respondent did not engage in any of the unfair labor practices set forth in the consolidated complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it cease and desist therefrom, and take certain affirmative action deemed necessary to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire the employees named below,

James J. Loudermilk Jr.
Sammy Lee Whitaker Jr.
Roy C. Evans
Randall Monteith
Norris P. Dale
Charles E. Phillips
James M. Johnston
Julian Buchanan
William L. Hunter
Robert E. Simmons

it shall be recommended that they be offered immediate employment in positions for which they have applied and are qualified, to the extent vacancies exist, and they shall be made whole for any earnings lost by reason of the discrimination against them, from the date of the refusal to hire to the date of a bona fide offer of reinstatement. As a caveat, however, it is noted that the make-whole remedy is not to exceed the earnings appurtenant to the vacancy actually filled by the Respondent on the date of discrimination. Thus, it is recommended that, where multiple discrimination findings derive from a single job, the status quo ante shall be restored limiting the individual backpay entitlements on a proportionate basis. Moreover, in all instances, sums due shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed as specified in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). All reinstatement and backpay recommendations are subject to the procedures discussed in *Dean General Contractors*, 285 NLRB 575 (1988), and *Haberman Construction Co.*, 236 NLRB 79 (1978).

[Recommended Order omitted from publication.]